

No. 12755

United States
Court of Appeals
for the Ninth Circuit.

FIREMAN'S FUND INSURANCE CO., a Corporation,

Appellant,

vs.

JAMES G. MULROY, as Administrator of the
Estate of Oscar Carl Johnson, Deceased, and
UNITED STATES OF AMERICA,

Appellees.

JAMES G. MULROY, as Administrator of the
Estate of Oscar Carl Johnson, Deceased,

Appellant,

vs.

FIREMAN'S FUND INSURANCE CO., a Corporation, UNITED STATES OF AMERICA,

Appellees.

Apostles on Appeal

Appeals from the United States District Court,
Western District of Washington,
Northern Division

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

MR. EDWARD S. FRANKLIN of

MESSRS. BOGLE, BOGLE & GATES,

Proctors for Appellant, and Cross-Appellee
Fireman's Fund Ins. Co.,
603 Central Building,
Seattle 4, Washington.

MR. JAMES G. MULROY,

Proctor for Appellee and Cross-Appellant
James G. Mulroy as Administrator of the
Estate of Oscar Carl Johnson, Deceased,
1410 Hoge Building,
Seattle 4, Washington.

MESSRS. J. CHARLES DENNIS and

VAUGHN E. EVANS,

Proctors for Appellee and Cross-Appellee
United States of America,
1017 U. S. Court House,
Seattle 4, Washington.

In the District Court of the United States for the
Western District, Northern Division
In Admiralty No. 14918

JAMES G. MULROY, as administrator of the
estate of Oscar Carl Johnson, deceased,
Libellant,

vs.

FIREMAN'S FUND INSURANCE CO., a Cali-
fornia corporation, and UNITED STATES
OF AMERICA,

Respondents.

AMENDED LIBEL IN PERSONAM

Comes now the libellant above named and for
cause of action against the respondents alleges:

I.

That the libellant is a resident of the City of
Seattle, Washington in the Western District of
Washington, Northern Division and as hereinafter
set forth is now the duly appointed, qualified and
acting administrator of the estate of Oscar Carl
Johnson, deceased.

II.

That the said Oscar Carl Johnson was a widower
and a resident of Seattle, King County, Washing-
ton when he died intestate on or about August 8,
1943, leaving as his only heir at law his only child,
a daughter who is now living, one Betty Jane John-
son Grant; that on or about May 14, 1945, the libel-

lant herein was appointed by the Superior Court of King County, Washington as administrator of the estate of the said decedent, Oscar Carl Johnson, and at all times thereafter has been and is now the duly appointed and qualified administrator of the said estate, and that this action is brought by him in the interest, behalf and for the exclusive benefit of the decedent's said daughter and only child.

III.

That now and at all times hereinafter mentioned the respondent, Fireman's Fund Insurance Co., is a corporation organized and existing under and by virtue of the laws of the State of California, authorized to do business and doing business in the Western District of Washington, Northern Division.

IV.

That Oscar Carl Johnson signed on with the rating of boatswain and as a member of the crew of the S.S. "Capillo," a merchant vessel of the United States of America, operated by the American Mail Line, a corporation, on a voyage commencing at the Columbia River, Oregon, on or about the 15th day of October, 1941, for a voyage to Asiatic waters, under written articles of employment, which provided, among other things, that said vessel would carry a policy of war risk insurance in the face amount of \$5,000.00 on the life of each member of the crew who might lose his life by reason of any act of war, arrests, restraints, internment or warlike operations; that in accordance with said agreement

respondent Fireman's Fund Insurance Co. issued its policy No. 6622 to the American Mail Line, Ltd. for the benefit of the crew of said vessel, including in said policy Oscar Carl Johnson, on said voyage.

V.

That thereafter the respondent, United States of America, through its agency, the War Shipping Administration, issued a seaman's war risk policy of insurance, commonly referred to as a second seaman's war risk policy, which provides for the payment of the sum of \$5,000.00 for loss of life, detention, and for various other things as the result of risk of war and warlike operations, and said policy included and covered Oscar Carl Johnson in his employment as boatswain on the S.S. "Capillo"; that neither said policy nor any copy thereof is in possession of the libellant, but such instrument or a copy thereof is in possession of the aforesaid War Shipping Administration as an agency of the respondent United States of America.

VI.

That said S.S. "Capillo" proceeded on her voyage and while in Oriental waters was attacked and destroyed by Japanese war operations on or about the 29th day of December, 1941, and thereafter all members of the crew of said vessel, including Oscar Carl Johnson, were interned and imprisoned in the Philippine Islands as acts of war by Japanese military forces.

VII.

That as a direct and proximate cause of the aforesaid warlike acts of the enemy Japanese, and because of their detention of, treatment and hardship inflicted upon the said Oscar Carl Johnson while he was interned as a prisoner of war in a Japanese prison camp in the Philippine Islands he died there on or about the 8th day of August, 1943.

VIII.

That respondents and each of them in writing were notified of the detention and subsequent death of the aforesaid Oscar Carl Johnson, and of the circumstances connected therewith, as set forth herein, and written demands upon each of said respondents have been made for the payment by them of the insurance provided by policies referred to in paragraphs IV and V of this amended libel, and at all times each of said respondents has denied and disclaimed any and all liability thereunder.

IX.

That there is existing some question as to which of the aforesaid policies of insurance are or were payable upon the death of Oscar Carl Johnson, and a judgment should be entered herein against such respondent as may be shown by the evidence at the trial of this action to be liable thereon.

Wherefore, libellant, for and in behalf of the aforesaid Betty Jane Johnson Grant, and for her exclusive benefit, prays that he have and recover judgment against the respondents Fireman's Fund

Insurance Co., a California corporation, or against the United States of America, whichever respondent shall be found liable under its policy of insurance covering as aforesaid Oscar Carl Johnson, deceased, in the sum of \$5,000.00, together with interest thereon from August 8, 1943; and for such other and further relief in the premises as the Court shall consider to be equitable and just.

/s/ JAMES G. MULROY.

United States of America,
Western District of Washington,
Northern Division—ss.

James G. Mulroy, being first duly sworn upon oath deposes and says: That he is the proctor of record for the libellant in the above-entitled action; that he has read the foregoing amended libel in personam, knows the contents thereof and believes the same to be true.

/s/ JAMES G. MULROY.

Subscribed and Sworn to before me this 24th day of September, 1946.

[Seal] /s/ DAVID H. JARVIS,

Notary Public in and for the State of Washington,
residing at Seattle.

Receipt of Copy acknowledged.

Lodged September 26, 1946.

[Endorsed]: Filed September 29, 1947.

[Title of District Court and Cause.]

ANSWER TO AMENDED LIBEL IN
PERSONAM

To the Honorable Judges of the District Court of
the United States for the Western District of
Washington:

The respondent, United States of America, for its
Answer to the Amended Libel in Personam on file
herein, admits, denies and alleges as follows:

I.

The respondent, United States of America, has
no knowledge or information sufficient to form a
belief as to the truth of the allegations of Article
I of the Amended Libel and therefore denies the
same.

II.

The respondent, United States of America, has no
knowledge or information sufficient to form a belief
as to the truth of the allegations of Article II of the
Amended Libel and therefore denies the same.

III.

The respondent, United States of America, has no
knowledge or information sufficient to form a belief
as to the truth of the allegations of Article III of
the Amended Libel and therefore denies the same.

IV.

Answering Article IV, respondent, United States
of America, admits that the deceased, Oscar Carl

Johnson, was a member of the crew of the S.S. Capillo and alleges it does not have sufficient information to form a belief as to the truth of the other allegations of said article and therefore denies the same.

V.

Answering Article V, respondent, United States of America, admits that subsequent to March 24, 1943, its agency, the War Shipping Administration, issued a Seaman's War Risk Policy of insurance, commonly referred to as a Second Seaman's War Risk Policy.

Further answering the allegations of said Article, said respondent denies that the said Second Seaman's War Risk Policy included and covered the deceased, Oscar Carl Johnson.

VI.

Respondent, United States of America, admits the allegations of Article VI.

VII.

Answering Article VII, the respondent, United States of America, alleges it does not have sufficient information to form a belief as to the truth of the allegations in said Article and therefore denies the same.

VIII.

Respondent, United States of America, admits the allegations of Article VIII.

IX.

Respondent, United States of America, denies the allegations of Article IX.

And by way of Further Answer and Affirmative Defense to said Amended Libel, the respondent, United States of America, alleges as follows:

First Affirmative Defense

That the libellant herein is not entitled, as Administrator of the Estate of Oscar Carl Johnson, to maintain this action.

Second Affirmative Defense

That the Amended Libel herein does not state a cause of action and that the Amended Libel affirmatively shows that the voyage of the S.S. Capillo, out of which this action arises, commenced more than 30 days prior to March 24, 1943, and fails to state whether or not the Administrator of the War Shipping Administration has exercised the discretion vested in him by Section 1292, Title 50, U.S.C., of finding that the loss of the deceased seaman is related to the war effort and not otherwise adequately provided for and therefore deemed to be covered by the terms of said policy.

Third Affirmative Defense

That the action herein is pre-mature.

Fourth Affirmative Defense

I.

That the voyage of the S.S. Capillo, out of which this action arises, commenced prior to the effective date of the Second Seaman's Policy of War Risk Insurance.

II.

That the alleged daughter of the deceased seaman, Oscar Carl Johnson, to wit, Betty Jane Johnson Grant, was not and is not now a dependent of the said deceased seaman, Oscar Carl Johnson.

III.

That the Administrator of the War Shipping Administration, pursuant to the provisions of Section 1292, Title 50, U.S.C., has, in the exercise of his discretion, determined that the alleged daughter of said deceased seaman is not entitled to a gratuitous award under the Second Seaman's Policy of War Risk Insurance.

Wherefore, having fully answered the Amended Libel herein, respondent, United States of America, prays that the same be dismissed and that it recover its costs and disbursements herein to be taxed.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

State of Washington,
County of King—ss.

Vaughn E. Evans, being first duly sworn, on oath deposes and says:

That he is one of the proctors for the respondent, United States of America, and makes this verification for and on its behalf as he is authorized so to

do; that he has read the within and foregoing Answer, knows the contents thereof and believes the same to be true.

/s/ VAUGHN E. EVANS.

Subscribed and sworn to before me this 24th day of June, 1949.

[Seal] /s/ J. CHARLES DENNIS,

Notary Public in and for the State of Washington,
residing at Tacoma.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 27, 1949.

[Title of District Court and Cause.]

STIPULATION FOR TAKING TESTIMONY
OF BETTY JANE JOHNSON GRANT,
UPON WRITTEN INTERROGATORIES

It is hereby stipulated and agreed by and between all parties to the above-entitled action that testimony herein of Betty Jane Johnson Grant, daughter of the above-named decedent, Oscar Carl Johnson, who is now a resident of the State of New Jersey, and who is unable personally to appear and testify at the trial of this cause may be taken upon interrogatories and cross-interrogatories to be forwarded to a Notary Public in the State of New Jersey, duly authorized there to administer oaths, and pro-

pounded to her by said Notary at her place of residence in said State.

Dated at Seattle, Washington, July 19, 1950.

FIREMAN'S FUND
INSURANCE CO.,

By BOGLE, BOGLE & GATES,
Its Attorneys.

UNITED STATES OF
AMERICA,

By
U. S. Attorney, and

/s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

/s/ JAMES G. MULROY,
Libellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 19, 1950.

[Title of District Court and Cause.]

INTERROGATORIES TO BE PROPOUNDED
TO BETTY JANE JOHNSON GRANT, IN
BEHALF OF LIBELLANT

1. Please state your name, age, place of residence, and if you are gainfully employed, your occupation, and compensation received therefrom.

Betty Jane Johnson Grant, 936 Bay Ave.,

Somers Point, N. J., waitress at Edgewater Restaurant, Longport, N. J., \$15.00 per week.

2. State your relationship to the above-named decedent, Oscar Carl Johnson.

Daughter.

3. What was your mother's name?

Johanna Wilcox Holmes.

4. Was your father also known as Carl Oscar Johnson?

Do not know.

5. Were your parents divorced, if so when and where.

Yes, July 7, 1926, Florence, Wis.

6. What other children did your parents have during the period of their marriage?

None.

7. Are you now married and living with your husband, if so please state his name, occupation and income.

Robert H. Grant, not living with him.

8. When and where were you married to your present husband?

Bunnell, Fla., Jan. 20, 1944.

9. Have you ever been married before?

Yes.

10. Have you any children? If so state their names and ages.

Roberta 6, Robert 4, Rebecca 3 months.

11. Were you at any time dependent for your living upon the decedent Oscar Carl Johnson?

Yes.

12. If you answer the foregoing interrogatory affirmatively, please state the period or periods during which you were so dependent, and define clearly the manner and extent of the support provided for you.

Until Jan. 1942, \$75.00 per mo. He was awarded custody of me in the divorce proceedings, his support stopped when he was taken prisoner.

13. During the period or periods referred to in interrogatory No. 12, were you at any time gainfully employed, and if so how much did you earn?

No.

14. During the periods when your father was at sea, with whom did you reside?

Mrs. W. Davis, Crystal Falls, Mich., a great aunt.

15. Who has provided for your support since August 6, 1943?

Great aunt until January, 1944 and then my husband.

16. Have you ever had technical or business training? If so, state the nature of such training, and when it was completed.

International Business Machine, partially completed in 1943.

State of New Jersey,
County of Atlantic—ss.

Betty Jane Johnson Grant, being first duly sworn, upon oath, deposes and says that she is the only child of Oscar Carl Johnson, deceased, that the foregoing answers were made by her to interrogatories propounded to her as a witness in Cause No. 14918, in the District Court of the United States for the Western District of Washington, Northern Division, that she has read said answers and the same are true and correct.

/s/ BETTY JANE JOHNSON
GRANT.

Subscribed and sworn to before me this 26th day of July, 1950.

[Seal] /s/ RICHARD S. THOMPSON,
Notary Public in and for the State of New Jersey,
residing at Somers Point.

Certificate of County Clerk that Richard S. Thompson is a Notary and authorized to administer oaths.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 8, 1950.

[Title of District Court and Cause.]

ANSWER TO LIBELLANT'S AMENDED
LIBEL

Comes Now respondent Fireman's Fund Insurance Company, a California corporation, and for

answer to the Amended Libel filed herein, admits, denies and alleges as follows:

I.

Answering Paragraph I, respondent admits the same.

II.

Answering Paragraph II, respondent admits the same.

III.

Answering Paragraph III, respondent admits the same.

IV.

Answering Paragraph IV, respondent denies the same.

V.

Answering Paragraph V, respondent admits the same.

VI.

Answering Paragraph VI, respondent admits the same.

VII.

Answering Paragraph VII, respondent denies the same.

VIII.

Answering Paragraph VIII, respondent admits the same.

Wherefore, having fully answered the Amended Libel of libelant, respondent Fireman's Fund Insurance Company prays that it may be dismissed

and recover its costs and disbursements herein to be taxed.

/s/ BOGLE, BOGLE & GATES,
Proctors for Fireman's Fund Insurance Company,
a California corporation, respondent.

United States of America,
Western District of Washington,
Northern Division—ss.

Edw. S. Franklin, being first duly sworn upon oath deposes and says: That he is one of the proctors of record for the respondent Fireman's Fund Insurance Company, a California corporation, in the above-entitled action; that he is authorized and does make this verification on behalf of said respondent; that he has read the foregoing Answer to Amended Libel, knows the contents thereof, and believes the same to be true.

EDW. S. FRANKLIN.

Subscribed and Sworn to before me this 7th day of August, 1950.

[Seal] /s/ ROBERT V. HOLLAND,
Notary Public in and for the State of Washington,
residing at Seattle.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 9, 1950.

In the United States District Court for the Western
District of Washington, Northern Division
In Admiralty No. 14918

JAMES G. MULROY, as Administrator of the
Estate of Oscar Carl Johnson, deceased,
Libellant,

vs.

FIREMAN'S FUND INSURANCE CO., a Cali-
fornia corporation, and UNITED STATES OF
AMERICA,
Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming regularly on for trial at Seattle, Washington, before the undersigned Judge of the above-entitled Court, upon the 15th day of August, 1950, the libellant, James G. Mulroy, a Proctor in Admiralty, duly authorized to appear and practice in this court, being present and acting in his own behalf; respondents, Fireman's Fund Insurance Co. and United States of America, being represented by their respective proctors, Edward S. Franklin, for Bogle, Bogle and Gates, and Vaughn E. Evans for J. Charles Dennis, United States Attorney; and all parties having presented their evidence upon the pleadings herein, and the Court having heard and considered the same together with argument of counsel thereon; and the Court being fully advised in the premises, now makes the following findings of fact and conclusions of law:

Findings of Fact

I.

The libellant is a resident of the City of Seattle, Washington, and is the duly appointed, qualified and acting administrator of the Estate of Oscar Carl Johnson, deceased.

II.

At the time of his death, Oscar Carl Johnson had been divorced from his former wife for many years. His daughter, Betty Jane Johnson Grant, is the only surviving child of said decedent, and is named as his next of kin in shipping articles hereinafter referred to.

III.

Respondent, Fireman's Fund Insurance Co. is a corporation organized under the laws of the State of California, and authorized to do and doing business in the State of Washington.

IV.

On or about October 15, 1941, Oscar Carl Johnson, with the rating of boatswain and as a member of the crew of the S.S. Capillo, a merchant vessel of the United States of America, operated by the American Mail Line, a corporation, acting as agent of the United States War Shipping Administration, with cargo consisting of United States military supplies destined for Manila, Philippine Islands, signed written shipping articles of employment, which provided, among other things, that

the said American Mail Line would provide war risk insurance in the principal amount of \$5,000.00 upon the life of each member of the crew of said vessel who might while so employed lose his life as the result of any act of war such as capture, seizure, destruction or damage by men of war, piracy, takings at sea, arrests, restraints and detainments and other warlike operations and acts of Kings, Princes and peoples in prosecution of hostilities; and in accordance with said agreement, respondent, the Fireman's Fund Insurance Company assumed the obligation of said insurance, and issued its policy of war risk insurance No. 6622, on October 17, 1941, in the sum of \$2,000 for each crew member, and on November 5, 1941, in the sum of \$5,000 for each crew member, to the American Mail Line, Ltd., for the benefit of the crew of said vessel, including in said policy Oscar Carl Johnson, on said voyage from the Columbia River, Oregon, to Manila and way ports in the Pacific Ocean.

V.

Thereafter, the respondent, United States of America, through its agency, the War Shipping Administration, issued by publication of certain regulations, a seaman's war risk policy of insurance, commonly called a "Second Seaman's War Risk" policy, providing war risk insurance to crew members of American flag ships, in the principal sum of \$5,000 for loss of life resulting from war and warlike operations generally, effective, however,

only in the event that such crew members be not already protected under such risks by other adequate insurance policies; said policy of Second Seaman's War Risk Insurance included and covered the said Oscar Carl Johnson, as aforesaid, in his employment as boatswain on the S.S. Capillo, only in the event that the United States of America or some officer or agency thereof made findings in accordance with the provisions of Title 46, U.S.C. Section 1128(a). That at no time did the United States or any officer or agency thereof find that it appeared or that it was a fact, that the conditions as set out in Section 1128(a), Title 46, U.S.C., as a prerequisite to furnishing war risk insurance or reinsurance upon the S.S. Capillo, existed with respect to said voyage so as to bring in force and effect said Second Seaman's War Risk insurance policy covering said Oscar Carl Johnson on said voyage. That in the absence of such finding, the said so-called Second Seaman's War Risk policy did not come into force and effect as to said Oscar Carl Johnson. And that at all times pertinent hereto the said policy of insurance of Fireman's Fund was in full force and effect as to said Oscar Carl Johnson and was adequate to cover the risks therein set forth. That the claim of libellant for the death of said Oscar Carl Johnson against said Fireman's Fund did not become liquidated until a judicial determination was made, as herein, as to the primary liability of the United States under applicable laws, rules and regulations.

VI.

The said S.S. Capillo proceeded on her aforesaid voyage, and while moored at or near Manila Harbor in the Philippine Islands was attacked and destroyed by Japanese war operations, on or about December 29, 1941. Prior to said date, owing to illness, Oscar Carl Johnson had been admitted to an hospital at Manila, P. I. for treatment and had not been returned to the said vessel at the time of its destruction, and was never aboard subsequent to November 28, 1941, but at all times subsequent to execution of the shipping articles herein referred to, and up to the date of his death, he was and remained a member of the crew of said vessel. Subsequent to the destruction of said vessel all members of its crew, including Oscar Carl Johnson, were captured and interned or detained and imprisoned as war prisoners by the Japanese Government, then at war with the United States of America.

VII.

As a direct and proximate result of the aforesaid warlike acts of the enemy Japanese, and by reason of their capture, arrest, restraint and detainment of Oscar Carl Johnson, and as a direct and proximate result of the treatment suffered by said seaman while a prisoner as aforesaid, the said Oscar Carl Johnson died in a Japanese war prisoner camp in the Philippine Islands, on or about August 6, 1943.

VIII.

Respondents, and each of them, in writing, were notified of the detention and subsequent death, as

herein heretofore set forth, of the aforesaid Oscar Carl Johnson, and written demands were made upon each of the said respondents, for payment by them of the insurances provided by war risk insurance policies referred to in paragraphs IV and V of these findings, and at all times each of said respondents has denied and disclaimed any and all liability thereunder.

IX.

That libellant has delayed pressing the claim against Fireman's Fund for trial in an effort to establish primary liability against the United States or to secure payment from the United States under the provisions of Title 50, U.S.C., Appendix .1292(b). That in view of such delay and the fact that the liability of said Fireman's Fund was contingent and unliquidated, it would be an abuse of discretion to allow interest on said claim prior to date of judgment herein.

Done in Open Court this 31st day of August, 1950.

/s/ PEIRSON M. HALL.

United States District Judge.

From the foregoing Findings of Fact, the Court now makes the following:

Conclusions of Law

I.

Libellant's cause of action against respondent, United States of America, should be dismissed.

II.

That at all times after October 15, 1941, to and including the date of his death, said Oscar Carl Johnson was a member of the crew of the said S.S. Capillo.

III.

War Risk Insurance Policy No. 6922, written and issued by respondent, Fireman's Fund Insurance Company, dated October 17, 1941, with coverage of \$5,000 for loss of life by crew members of the S.S. Capillo as shown in shipping articles of said vessel dated on or about October 11, 1941, was in full force and effect at all times from and after October 17, 1941, and November 7, 1941, to and including the date of the death of said Oscar Carl Johnson on August 6, 1943, and constitutes complete and adequate war risk coverage for loss of life by Oscar Carl Johnson, a crew member of the said ship, while a prisoner of war.

IV.

The libellant herein is now entitled to recover of and from respondent, Fireman's Fund Insurance Company, a California corporation, judgment in the principal sum of Five Thousand Dollars (\$5,000), together with interest thereon at the rate of six per cent (6%) per annum from date of judgment until paid; and libellant is further entitled to recover his costs and disbursements in this action, to be taxed and allowed as provided by law and the practice of this court.

V.

All the conclusions of law contained in the foregoing Findings of Fact, whether herein again stated or not.

Done in Open Court this 31st day of August, 1950.

/s/ PEIRSON M. HALL,
United States District Judge.

OK as to form:

BOGLE, BOGLE & GATES,
Proctors for Fireman's Fund
Ins. Co.

Approved as to form:

/s/ VAUGHN E. EVANS,
Of Proctors for Respondent,
U. S. of A.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 31, 1950.

In the United States District Court for the Western
District of Washington, Northern Division
In Admiralty No. 14918

JAMES G. MULROY, as Administrator of the
Estate of Oscar Carl Johnson, deceased,
Libellant,

vs.

FIREMAN'S FUND INSURANCE CO., a Cali-
fornia corporation, and UNITED STATES OF
AMERICA,

Respondents.

DECREE

This matter coming on regularly for trial August 15, 1950, all parties being represented by their respective counsel of record, evidence being presented and the Court having heard and considered the same, together with argument of counsel, and the Court having heretofore made, signed and entered its Findings of Fact and Conclusions of Law, and being fully advised in the premises, now, therefore, it is hereby

Ordered, Adjudged and Decreed that (1) the libellant's action against the United States of America is hereby dismissed; and (2) the libellant herein, James G. Mulroy, as Administrator of the Estate of Oscar Carl Johnson, do have and recover of and from, and he is hereby granted, judgment against respondent, Fireman's Fund Insurance Company, a California corporation, in the sum of Five Thousand Dollars (\$5,000), with interest thereon at the rate of six per cent (6%) per annum from date hereof, until paid, together with his costs and disbursements in this action to be taxed and allowed as provided by law and the practice of this Court.

Done in Open Court this 31st day of August, 1950.

/s/ PEIRSON M. HALL,

United States District Judge.

Presented by:

/s/ VAUGHN E. EVANS,

Assistant U. S. Attorney.

[Endorsed]: Filed and entered in Admiralty—
Docket August 31, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL BY RESPONDENT
FIREMAN'S FUND INSURANCE COMPANY

To: James G. Mulroy, as Administrator of the
Estate of Oscar Carl Johnson, deceased; J.
Charles Dennis, United States District Attor-
ney, and Vaughn E. Evans, Assistant United
States District Attorney:

Please Take Notice that Fireman's Fund Insur-
ance Company, a respondent in the above-entitled
cause, hereby appeals to the United States Court of
Appeals for the Ninth Circuit from the final decree
of this court entered herein on the 31st day of
August, 1950, and from each and every part of said
decree.

Dated this 24th day of October, 1950.

BOGLE, BOGLE & GATES,
Proctors for Respondent Fireman's Fund Insurance
Co., a corporation.

ORDER ALLOWING APPEAL

It Is Ordered that the appeal herein be allowed
as prayed for.

Done In Open Court this 24th day of October,
1950.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented by:

/s/ EDW. S. FRANKLIN,
Of Proctors for Respondent, Fireman's Fund In-
surance Co.

[Endorsed]: Filed October 24, 1950.

[Title of District Court and Cause.]

CITATION

United States of America,
State of Washington,
County of King—ss.

The President of the United States.

To: James G. Mulroy, as Administrator of the
Estate of Oscar Carl Johnson, Deceased; and
United States of America, and its proctors,
Hon. J. Charles Dennis, United States District
Attorney, and Vaughn E. Evans, Assistant
United States District Attorney:

You are hereby cited and admonished to be and
appear in the United States Court of Appeals for
the Ninth Circuit forty days after the date of this
citation pursuant to an appeal duly obtained from
a decree of the District Court of the United States
for the Western District of Washington, Northern
Division, wherein Fireman's Fund Insurance Com-
pany, respondent, is appellant, and you are appel-
lees, to show cause, if any there be, why the said
decree entered on August 31, 1950, should not be
corrected and why speedy justice should not be
done to the parties in that behalf.

Witness, the Honorable John C. Bowen, Judge
of the District Court of the United States for the
Western District of Washington, Northern Divi-
sion, this 24th day of October, 1950.

[Seal] /s/ JOHN C. BOWEN,
U. S. District Judge.

[Endorsed]: Filed October 24, 1950.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

The appellant, Fireman's Fund Insurance Company, a corporation, hereby assigns error in the proceedings, decrees, orders and decisions of the District Court in the above entitled action as follows:

(1) The court erred in finding that libelant was entitled to recover under the war risk policy issued by Fireman's Fund Insurance Company for the death of Oscar Carl Johnson, deceased.

(2) The court erred in entering the decree herein.

BOGLE, BOGLE & GATES,
Proctors for Fireman's Fund Insurance Company,
a Corporation.

[Endorsed]: Filed October 24, 1950.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND

Know All Men By These Presents: That the undersigned principal and the undersigned surety are held and firmly bound unto the United States of America in the sum of Two Hundred and Fifty (\$250.00), and the further sum of Six Thousand Dollars (\$6,000.00) money of the United States, for the payment thereof to the benefit of whom it

may concern; that the said principal and the said surety bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seal on this 24th day of October, 1950.

The conditions of this obligation are such that

Whereas, respondent, Fireman's Fund Insurance Company, has appealed to the United States Court of Appeals for the Ninth Circuit from the decree of the District Court of the United States for the Western District of Washington, Northern Division, on the 31st day of August, 1950, which decree orders the said respondent Fireman's Fund Insurance Company to pay libellant, James G. Mulroy, the sum of Five Thousand Dollars (\$5,000.00) with interest thereon at the rate of 6% per annum, together with costs and disbursements; and

Whereas, the said Fireman's Fund Insurance Company, a corporation, desires, during the progress of such appeal, to stay the execution of said decree of the District Court.

Now, Therefore, the condition of this obligation is such that if the above named appellant, Fireman's Fund Insurance Company shall prosecute said appeal with effect and pay all costs which may be awarded against it as such appellant if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States Court of Appeals for the Ninth Circuit in this cause, on the mandate of said court by the court below, then this obligation shall be void, otherwise the same shall remain in full force and effect.

FIREMAN'S FUND INSURANCE COMPANY,
A Corporation.

By BOGLE, BOGLE & GATES,
Its Proctors,
Principal.

FIREMAN'S FUND INDEMNITY COMPANY,

[Seal] By /s/ F. J. SELLEN,
Its Attorney in Fact,
Surety.

This bond approved as to form and amount and sufficiency of surety.

Done In Open Court this 25th day of October, 1950.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ EDW. S. FRANKLIN,
Counsel for Bogle, Bogle & Gates, Proctors for Respondent, Fireman's Fund Insurance Co.

[Endorsed]: Filed October 25, 1950.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

James G. Mulroy, Libellant and Cross-Appellant herein, hereby assigns error in the proceedings, decrees, orders and decisions of the United States District Court in the above entitled action, as follows:

1. The court erred in finding, ruling and entering a decree,

(a) That libellant was entitled to recover under the War Risk Insurance Policy issued by Fireman's Fund Insurance Company, for death of Oscar Carl Johnson, deceased, only the total principal amount of said policy, and costs, together with interest from August 31, 1950.

(b) Dismissing libellant's cause of action against Respondent United States of America.

2. Denying libellant's motion to vacate the Court's minute entered order dated August 16, 1950, directing that Judgment herein, "will carry interest only from the date of Judgment."

/s/ JAMES C. MULROY,
Libellant and
Cross-Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 20, 1950.

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL
BY RESPONDENT

To: Fireman's Fund Insurance Co., a California Corporation, United States of America, and to Bogle, Bogle & Gates, J. Charles Dennis and

Vaughn E. Evans, Respondents and Their Proctors:

Please Take Notice that James G. Mulroy, Libellant in the above entitled cause, hereby cross-appeals to the United States Circuit Court of Appeals for the Ninth Circuit from all portions and parts of the final decree of this court, entered herein upon the 31st day of August, 1950, in which,

1. Libellant's cause of action against the respondent United States of America was dismissed,

2. Libellant was denied judgment of interest upon the amount awarded him by the aforesaid decree, from August 6, 1943, to August 31, 1950.

Dated at Seattle, Washington, November 20, 1950.

/s/ JAMES G. MULROY,
Libellant.

The cross-appeal as hereinabove is allowed as prayed for.

Done in open court, November 20, 1950.

/s/ JOHN C. BOWEN,
Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 20, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON
AND DESIGNATION OF RECORD

Cross-appellant, James G. Mulroy, herein, adopts his assignments of errors, heretofore herein filed,

as his statement of points upon which he intends to rely in this cross-appeal.

Said cross-appellant designates the entire record as necessary for consideration of this cross-appeal.

/s/ JAMES G. MULROY,
Libellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 20, 1950.

In the District Court of the United States for the
Western District of Washington Northern
Division

No. 14918

JAMES G. MULROY, as Administrator of the
Estate of OSCAR CARL JOHNSON, De-
ceased,

Libellant,

vs.

FIREMAN'S FUND INSURANCE CO., a Cali-
fornia Corporation, and UNITED STATES
OF AMERICA,

Respondents.

TRANSCRIPT OF TESTIMONY

Before: The Honorable Peirson M. Hall,
District Judge.

August 15, 1950

Be It Remembered, that on the 15th day of
August, 1950, at the hour of 10:00 o'clock a.m., the

above entitled and numbered cause came on for trial before the Honorable Peirson M. Hall, one of the judges of the above entitled court, sitting in the United States Federal Court House, City of Seattle, County of King, State of Washington;

The libellant appearing by James G. Mulroy, Esq.;

The respondent, Fireman's Fund Insurance Company, appearing by Edward S. Franklin, Esq., and Robert V. Holland, Esq., of Bogle, Bogle and Gates;

The respondent, United States of America, appearing [1*] by Vaughn Evans, Esq.;

Whereupon, the following proceedings were had and testimony given, to-wit:

The Court: Let a minute order be entered appointing Bernard Ayres to act as official stenographer of this court during this day's proceedings, which substitution for the regular reporter is made by reason of the fact that the official court stenographer of this court could not be present.

You may proceed.

Mr. Mulroy: May it please the Court, in the action now to be presented to Your Honor, I am the libellant, and it is my impression and belief that the ultimate issue, if not, indeed, the only real issue to be determined, and the \$64.00 question finally to be answered, is this:

When a war prisoner in custody dies of illness because the captor has deprived medical attendance of instruments needed for his effective treatment, is the death a proximate result of the capture?

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

The Court: Well, counsel, by that statement you concede he died from tuberculosis? [2]

Mr. Mulroy: No, not tuberculosis, if Your Honor please, an abcess. I will introduce evidence as to the disease of which he died.

The Court: I see.

Mr. Mulroy: I do not concede anything that is not covered in the proof.

Inasmuch as the matters to be proven by the libellant are essentially contained within the four corners of the libel, I will give consideration to those first, and invite the Court's attention to the pleadings, setting out, if I can, the different interests. I take first the Fireman's Fund, the action against the Fireman's Fund.

The answer of that respondent admits all of the allegations of the libellant except paragraphs IV and VII. Number IV reads as follows:

“That Oscar Carl Johnson signed on with the rating of boatswain and as a member of the crew of the SS Capillo, a merchant vessel of the United States of America, operated by the American Mail Line, a corporation, on a voyage commencing at the Columbia River, Oregon, on or about the 15th day of October, 1941, for a voyage to Asiatic waters, under written articles of employment, which provided, among other things, that said vessel would carry a policy of war risk insurance [3] in the face amount of \$5,000.00 on the life of each member of the crew who might lose his life by reason of any act of war, arrests, restraints, intern-

ment or warlike operations; that in accordance with said agreements respondent Fireman's Fund Insurance Company issued its policy Number 6622 to the American Mail Line, Ltd., for the benefit of the crew of said vessel, including said policy Oscar Carl Johnson, on said voyage."

All the proof to be offered is documentary, if Your Honor please, and this paragraph will be supported by a photostatic copy of the shipping articles of that voyage and by a photostatic copy of Policy Number 6622 of the Fireman's Fund Insurance Company.

Number VII.

"That as a direct and proximate cause of the aforesaid warlike acts of the enemy Japanese, and because of their detention of, treatment and hardship inflicted upon the said Oscar Carl Johnson while he was interned as a prisoner of war in a Japanese prison camp in the Philippine Islands he died there on or about the 8th day of August, 1943."

In support of that will be introduced a case history of this man's illness during the time he was interned in the Japanese prison camp, and, also, the shipping articles [4] will show his death as of the 8th day of August, 1943—not the shipping articles, but I will introduce certain pages from the official log of the SS Capillo.

The Court: To show his death?

Mr. Mulroy: I beg your pardon, Your Honor?

The Court: To show his death?

Mr. Mulroy: To show his death, yes, Your Honor.

That is all that is controverted. Those two paragraphs are all the allegations of the libellant that are controverted by the Fireman's Fund, except I may call Your Honor's attention to the fact that the Fireman's Fund Insurance Company has not made any answer to Paragraph IX, which reads:

"That there is existing some question as to which of the aforesaid policies of insurance are or were payable upon the death of Oscar Carl Johnson, and a judgment should be entered herein against such respondent as may be shown by the evidence at the trial of this action to be liable thereon."

Turning now to the proof required as against the answer of the respondent, United States of America, the United States of America has denied, because of lack of knowledge or information sufficient to form a belief, Paragraphs I, II, III, IV and part of V, and VII. I, II, III, [5] IV and VII have been denied by the respondent, United States of America because of lack of knowledge or information sufficient to form an opinion. Paragraph V has been denied in part by the United States of America and admitted in part. The part which is denied is—I turn to paragraph V:

"That thereafter the respondent, United States of America, through its agency, the War Shipping Administration, issued a seaman's war risk policy of insurance, commonly referred to as a second seaman's war risk policy,

which provides for the payment of the sum of \$5,000.00 for loss of life, detention, and for various other things as the result of risk of war and warlike operations,”

and that portion of Paragraph V is admitted by the respondent, United States of America, and the balance of the paragraph which reads:

“and said policy included and covered Oscar Carl Johnson in his employment as boatswain on the SS Capillo,”

is denied. It is not denied——

“that neither said policy nor any copy thereof is in possession of the libellant, but such instrument or a copy thereof is in possession of the aforesaid War Shipping Administration as an agency [6] of the respondent United States of America.”

The Court: Well, they have been produced.

Mr. Mulroy: They will be produced. Yes, Your Honor.

Now, Number IX, Paragraph IX, which is the paragraph that I spoke of as stating that there is existing some question as to the liability, that was denied by the respondent, United States of America.

It is now my task to furnish proof as to the allegations of the libel which have been controverted by either one of the parties, and I take first the respondent, Fireman's Fund Insurance Company, and I will ask the clerk to mark in the appropriate manner for identification this exhibit.

(Letter and two enclosures from American Mail Line to Mr. James G. Mulroy, 1410 Hoge Building, Seattle 4, Washington, dated September 25, 1945, marked Libellant's Exhibit No. 1 for identification.)

The Court: What is it?

Mr. Mulroy: Exhibit 1 is a letter from the American Mail Line as agents for the——

The Court: (Interposing): Counsel have seen all these exhibits?

Mr. Franklin: I have not seen that one, if Your Honor please. [7]

(Exhibit in question exhibit to Mr. Franklin.)

Mr. Mulroy: Mark this.

(Photostatic copy of Fireman's Fund Insurance Policy No. 6622 marked Libellant's Exhibit No. 2 for identification.)

The Court: Have you seen Exhibit 2? You are?——

Mr. Franklin: If Your Honor please, this is my associate, Mr. Holland.

The Court: Very well. Have you seen Exhibit 2, Mr. Franklin?

Mr. Franklin: Yes, Your Honor.

The Court: Exhibit 2 is the copy of the Fireman's Fund Insurance Company policy.

Mr. Mulroy: I offer Exhibits 1 and 2 in evidence.

Mr. Franklin: No objection.

Mr. Evans: No objection.

The Court: Admitted.

(Documents previously marked as Libellant's Exhibits 1 and 2 for identification received in evidence.)

LIBELLANT'S EXHIBIT No. 1

American Mail Line
740 Stuart Building Seattle 1, Washington

September 25, 1945

Mr. James G. Mulroy
1410 Hoge Building
Seattle 4, Washington

Dear Sir:

S/S "CAPILLO"

Oscar Carl Johnson, Deceased

In accordance with your request, we attach hereto copy of Medical report dated August 7, 1943, and copy of Funeral expense invoice dated August 9, 1943, both in connection with the late Oscar Carl Johnson.

Very truly yours,

UNITED STATES OF AMERICA WAR SHIP-
PING ADMINISTRATION,
AMERICAN MAIL LINE, LTD.,
General Agents,

By /s/ R. A. CLANCEY.

EFM:eg

Enclosure (2)

FUNERARIA NACIONAL

917-919 Ave. Rizal

Manila

Manila, P. I., August 9th, 1943

Mr. P. B. Neubauer,

c/o Everett Steamship Corp., Agents.

To Funeral Services Rendered the Late Oscar Carl
Johnson.

To use of one temporary casket.

“ mortuary decoration and deposit in the
Chapel.

“ use of one funeral hearse automobile for the
transportation of the remains to the
Crematory.

“ temporary preservation of the remains.

“ Health requisitions and permits fees.

“ one cremation board.

“ cremation fees at the San Lazaro Hospital
Crematory.

200.00

Total Services: Two Hundred Pesos....

Received Payment

FUNERARIA NACIONAL,

By /s/ ANTONIO QUIOGUE,

Manager.

August 9 Official cremation receipt
#0137816 30.00

August 9 Transportation to and from Crema-
torium for Mr. Lundquist and Mr.
Neuham to witness cremation... 2.00

August 11	For one Wreath	10.00
		<hr/>
		\$12.00

(Copy)

Santa Catalina Hospital
Santo Tomas Internment Camp, Manila

Name: Johnson, Oscar Carl

Nat.: American

Occupation: Seaman

Date: August 7th, 1943

Age: 45

Sex: Male

Room:

This patient was first seen on January 8, 1942, only a day or so after the Internment Camp started and although the record is very scanty at that point, a diagnosis of pulmonary tuberculosis was made. On that basis, permission was obtained from the Camp authorities to transfer him away from the Internment Camp. He was at San Lazaro Hospital from January 10, 1942, to April 28, 1942—107 days, and what happened during that time is obscure. He was very dissatisfied in that hospital and was transferred to the Philippine Tuberculosis Hospital which was then situated in the old buildings of the San Juan de Dios Hospital. He was there from April 28 to August 20—115 days. A diagnosis was made of abscess of the lung. Later on the writer of this record (H. L. Robinson, M.D.) went to the hospital and saw X-Ray films taken during his stay.

One of them, at any rate was taken after the intra-bronchial installation of an opaque fluid, for it showed shadows of such fluid in the lower right bronchus without evidence of bronchiectasis. There was a large abscess cavity about the level of the anterior end of the fourth rib with a fluid level and much evidence of infiltration below and around the cavity. The diameter of the cavity was about three times the width of a rib. The opaque fluid did not enter the cavity. A lateral film showed that the cavity was in the central portion of the lung. There was no evidence of silicosis or of tuberculosis. The patient stated that the physicians at the hospital told him definitely that he was not tuberculous and should not be in a hospital for tuberculosis. From August 20 to October 4, 1942—45 days—he was in the Philippine General Hospital and their letter of October 22 said “The following final diagnoses: Bronchial asthma; pulmonary tuberculosis, chronic (?).” He then returned to camp and was in the Camp Hospital from October 4 to October 10—6 days—and his cough was so severe that it annoyed the other patients, consequently he was sent to Sulphur Springs, a branch Internment Camp for sufferers from chronic disease. He was there from October 10 to October 21—11 days. He was very dissatisfied with the food and the facilities there and insisted upon returning to the Camp Hospital. He was in the Camp Hospital from October 21, 1942, to August 6, 1943, the date of his death—a total of 289 days. During that time he often tried postural drainage with rather unsat-

isfactory result. He gradually lost weight, often had swelling of the ankles and occasional attacks of asthma. On January 7, 1943, he had a small hemoptysis and on February 2, another, of about 200 c.c. There was another small one on March 3. From the X-ray film it was the judgment of this writer that nothing would be effective except a lobectomy. I interviewed Doctor Canizares personally. He is the leading thoracic surgeon in the Philippines. He said that having been deprived of some of his equipment he was unwilling to even consider doing a lobectomy on anyone. For more than a year, I have been urging that the man be accommodated on any repatriation vessel which should leave the Philippine Islands but there has been no such opportunity. Late in July, 1943, the man had a small hemoptysis and again on August 6 at 9:00 p.m. he had a very large pulmonary hemorrhage, witnessed by Doctor D. Borja, amounting to 500 cc of blood, more or less. The man lost consciousness, never became conscious again and died at 9:20 p.m., D.S.T.

Diagnosis:

Abscess of the Right Lower Lobe of the Lung,
Non-Tuberculous

/s/ HUGH L. ROBINSON, M.D.,

Staff Physician, Santa Catalina Hospital, Santo
Tomas Internment Camp.

Dr. Hugh L. Robinson,
165 Grove Street,
Auburndale, Massachusetts, U. S. A.

Admitted August 15, 1950.

LIBELANT'S EXHIBIT No. 2

\$104.00.

No. 6622

Fireman's Fund
Insurance Company
San Francisco, California

4 copies sent

Saunders (Hall Murphy) 10% mp

By This Policy of Insurance
American Mail Line, Ltd.

Does Insure

.....as follows:

In Consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of Seven Hundred Eighty Dollars (\$780) as a premium at and after the rate of $\frac{3}{4}$ per cent for such Insurance the said Company takes upon itself the burden of such Insurance in the amount of One Hundred and Four Thousand Dollars (\$104,000) and promises and agrees with the assured, their Executors and Administrators in all respects truly to perform and fulfill the Contract contained in this Policy. And it is hereby agreed and declared that the said Insurance shall be and is an Insurance upon Protection and Indemnity Risks in respect to liability of the Assured for claims for loss of life, injury or disability as per slip attached, and is warranted free of all other claims of and in the good Steamer called the "Capillo" or by whatsoever other name or names the said ship is or shall be named or called, lost or not lost, at and from Columbia River port or ports

(sailing on or about October 15, 1941) to Shanghai, Hongkong, Philippine Islands port or ports, while there and return to Columbia River and/or Puget Sound port and/or ports or until the expiration of one hundred days (100) from moment vessel sails from first Columbia River port, whichever may occur first, or held covered.

~~Touching the adventures and perils which the~~ said Company is content to bear and does take upon itself; they are of the seas, fires, pirates, rovers, assailing thieves, jettisons, criminal barratry of the master and mariners, and of all other like perils, losses and misfortunes, that have or shall come to the hurt, detriment, or damage of the aforesaid subject matter of this insurance or any part thereof.

In case of any loss or misfortune it shall be lawful and necessary for the Assured, their factors, servants and assigns, to sue, labor, and travel for, in and about the defence, safeguard, and recovery of the aforesaid subject matter of this insurance, or any part thereof, without prejudice to this insurance; the charges whereof the said Company shall bear in proportion to the sum hereby insured.

It is expressly declared and agreed that no acts of the said Company or Assured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

In Witness Whereof the Fireman's Fund Insurance Company has caused this policy to be signed by its duly authorized officers in the City of San Francisco, State of California, this 17th day of October, one thousand nine hundred and forty-one.

Not Valid Unless Countersigned by R. T. Saunders, Manager, Seattle, Washington.

Countersigned
Manager.

This Policy Covers War Risk Only
As Follows and Is
Warranted Free of All Other Claims

This insurance covers only contractual liability of the assured for claims for loss of life or injury to or disability of licensed personnel, not exceeding eight (8) and unlicensed personnel, not exceeding thirty-two (32), as result of capture, seizure, destruction or damage by men of war, piracy, takings at sea, arrests, restraints and detainments and other warlike operations and acts of Kings, Princes and Peoples in prosecution of hostilities, whether before or after declaration of war and whether by a belligerent or otherwise, including factions engaged in civil war, revolution or rebellion or insurrection, or civil strife arising therefrom, and including the risks of aerial bombardment, floating or stationary mines and stray or derelict torpedoes. In no case shall liability of these Underwriters exceed \$5,000—each in respect to licensed personnel nor \$2,000—each in respect to unlicensed personnel.

Schedule One

The Assurer will pay, in case of loss, an amount to be determined by applying the percentage shown below to the amount for which the master, officer, or member of the crew is insured, as follows:

Life	100%
Both hands	100%
Both arms	100%
Both feet	100%
Both legs	100%
Both eyes	100%
Hand	50%
Arm	65%
Foot	50%
Leg	65%
Eye	45%
Total destruction of hearing.....	50%

The indemnities referred to above are payable, provided loss results directly and exclusively from bodily injuries, within ninety (90) days from the date of accident. Loss shall mean, with regard to hands and feet, arms and legs, dismemberment by severance at or about wrist or ankle, knee or elbow joints, or the complete and irrecoverable loss of function. With regard to eyes, complete and irrecoverable loss of sight. With regard to hearing, total and irrecoverable loss of hearing in both ears.

Schedule Two

For injury not described in Schedule One, but not for illness, resulting in permanent disability preventing the person injured from performing any and every kind of duty pertaining to such person's occupation, the Assurer will pay compensation at the same rate as the earnings of the injured person immediately preceding the injury, payments to be made in monthly installments, until such time

as the total compensation as paid shall amount to the principal sum for which the injured master, officer or member of the crew is insured.

Notwithstanding anything herein contained to the contrary, it is agreed this insurance shall not be vitiated by a deviation or change of voyage of the vessel, in which event an additional premium shall be paid if required.

Non-payment of Premium Clause—The Assured shall be directly liable to the Assurer for all premiums under this policy. If payment of premium is not made by the Assured within ten (10) days after attachment of the insurance, this policy may be cancelled at any time thereafter by the Assurer giving to the Assured named herein five (5) days notice of such cancellation.

Loss, if any, subject however to all the terms and conditions of this policy, is payable to American Mail Line Ltd. for distribution by it in accordance with agreement made with each seaman concerned.

Attached to and made a part of Policy No. 6622 of the Fireman's Fund Insurance Company issued to American Mail Line Ltd. per S.S. "Capillo."

(Copy)

Endorsement
Seattle, Washington

November 5, 1941

In consideration of the payment of an additional premium of \$720, it is hereby understood and agreed that effective October 18, 1941, the amount

insured in respect to unlicensed personnel is increased from \$2,000 each to \$5,000 each and the total amount insured under policy to which this endorsement is attached is increased from \$104,000 to \$2,000,000.

Warranted no known or reported loss as of October 18, 1941.

It is further understood and agreed voyage during which vessel is insured hereunder is changed to read as follows:

at and from Columbia River port or ports (sailing on or about October 15, 1941) via Honolulu to Shanghai, Hong Kong, Philippine Island port or ports, while there and return to Columbia River and/or Puget Sound port and/or ports or until the expiration of one hundred (100) days from moment vessel sails from first Columbia River port, whichever may occur first, or held covered.

All other terms and conditions remain unchanged.

Attached to and made part of policy number 6622 of the Fireman's Fund Insurance Company issued to American Mail Line Ltd. per Steamer "Capillo."

FIREMAN'S FUND INSURANCE COMPANY,

By COPY,

Agent.

Admitted August 15, 1950.

The Court: Do you wish to use either one of these?

Mr. Mulroy: When Your Honor is through with them, I wish to make certain comments on them.

The Court: I will read this. The provisions [8] of the policy have previously been quoted in the memorandum by the Fireman's Fund?

Mr. Franklin: Yes, Your Honor.

The Court: And this report signed by Robinson is the one quoted in your memorandum, as well?

Mr. Franklin: I think, if Your Honor please, as it is set out in my demand for genuineness of documents.

The Court: Oh, yes.

Mr. Mulroy: If Your Honor please, I acquiesced in that demand and offered no objection.

The Court: Very well. I read that just before I came on the bench.

Mr. Mulroy: In offering Exhibit 1 at this time, I do so in order to answer at once your Honor's question as to the cause of death. This certificate is a case report by Hugh L. Robinson who apparently was the attending physician of the decedent, Oscar Carl Johnson.

“This patient was first seen on January 8, 1942, only a day or so after the Internment Camp started, and although the record is very scanty at that point, a diagnosis of pulmonary tuberculosis was made. On that basis, permission was obtained from the Camp authorities to transfer him away from the Internment Camp. He was at San Lazaro Hospital from January 10, 42, to April 28, 1942—107 days;

and [9] what happened during that time is obscure. He was very dissatisfied in that hospital and was transferred to the Philippine Tuberculosis Hospital which was then situated in the old buildings of the San Juan de Dios Hospital. He was there from April 28 to August 20—115 days. A diagnosis was made of abscess of the lung. Later on the writer of this record (H. L. Robinson, M. D.) went to the hospital and saw X-ray films taken during his stay. One of them at any rate was taken after the intra-bronchial installation of an opaque fluid, for it showed shadows of such fluid in the lower right bronchus without evidence of——

The Court: Oh, go ahead. Nobody knows how to pronounce it anyway.

Mr. Mulroy (Continuing): “There was a large abscess cavity about the level of the anterior end of the fourth rib with a fluid level and much evidence of infiltration below and around the cavity. The diameter of the cavity was about three times the width of a rib. The opaque fluid did not enter the cavity. A lateral film showed that the cavity was in the central portion of the lung. There was no evidence of silicosis or of tuberculosis. The patient stated that the physicians at the hospital [10] told him definitely that he was not tuberculous and should not be in a hospital for tuberculous. From August 20 to October 4, 1942—45 days

—he was in the Philippine General Hospital and their letter of October 22 said “The following final diagnosis: Bronchial asthma; pulmonary tuberculosis, chronic (?).” He then returned to camp and was in the Camp Hospital from October 4 to October 10—6 days—and his cough was so severe that it annoyed the other patients, consequently he was sent to Sulphur Springs, a branch Internment Camp for sufferers from chronic disease. He was there from October 10 to October 21—11 days. He was very dissatisfied with the food and the facilities there and insisted upon returning to the Camp Hospital. He was in the Camp Hospital from October 21, 1942, to August 6, 1943, the date of his death—a total of 289 days. During that time he often tried postural drainage with rather unsatisfactory result. He gradually lost weight, often had swelling of the ankles and occasional attacks of asthma. On January 7, 1943, he had a small hemoptysis and on February 2, another, of about 200 cc. There was another small one on March 3. From the X-ray film it was the judgment of this writer that nothing would be effective except a lobectomy. I interviewed [11] Doctor Canizares personally. He is the leading thoracic surgeon in the Philippines. He said that having been deprived of some of his equipment he was unwilling to even consider doing a lobectomy on anyone.”

The Court: Just a minute. What is a hemoptysis?

Mr. Mulroy: I have not examined the meaning of that, but I think it means nothing more or less than a hemorrhage.

The Court: Is that what it means?

Mr. Franklin: That is what it means, if Your Honor please.

Mr. Mulroy: "For more than a year I have been urging that the man be accommodated on any repatriation vessel which should leave the Philippine Islands, but there has been no such opportunity. Late in July, 1943, the man had a small hemoptysis and again on August 6 at 9:00 p.m. he had a very large pulmonary hemorrhage, witnessed by Doctor D. Borja, amounting to 500 cc of blood, more or less. The man lost consciousness, never became conscious again, and died at 9:20 p.m., D.S.T."

The final diagnosis is: "Abscess of the right lower lobe of the lung, non-tuberculous."

Inasmuch as Paragraph IV of the libel was controverted by the respondent, Fireman's Fund, I consider it necessary to offer in evidence the shipping articles of the S.S. Capillo on the voyage referred to in this action.

The Court: That will be Number 3.

(Shipping Articles referred to, a photostatic copy, marked Libellant's Exhibit Number 3 for identification.)

The Court: Is this to prove that he signed on?

Mr. Mulroy: That he signed on as a boatswain, was a member of the crew of the Capillo, a merchant vessel of the United States of America——

The Court: Have you examined this, Mr. Franklin?

Mr. Franklin: Yes, Your Honor.

Mr. Mulroy (Continuing): ——on a voyage commencing at the Columbia River, Oregon. It will be noted from that exhibit that Oscar Carl Johnson's name appears as the boatswain; that he has designated Betty Jane Johnson Grant, his daughter, as next of kin.

The Court: Very well.

Mr. Mulroy: In connection with Paragraph IV, I have already introduced the respondent, Fireman's Fund Policy Number 6622.

The Court: Well, now, does a boatswain come under licensed personnel or unlicensed personnel?

Mr. Mulroy: I am not sure about that, and I consider it not necessary to acquaint myself.

Mr. Franklin: We will concede that a boatswain is an unlicensed personnel, if Your Honor please.

The Court: Unlicensed personnel?

Mr. Franklin: Yes, Your Honor.

Mr. Mulroy: The policy of insurance in the first place insured for \$5,000.00 the lives of licensed personnel and \$2,000.00——

The Court (Interposing): There was a rider attached?

Mr. Mulroy: Yes.

The Court: So the amount involved is \$5,000.00, too?

Mr. Mulroy: Yes, Your Honor.

The Court: Very well.

Mr. Mulroy: I should like to glance at that exhibit, if Your Honor please.

The Court: You mean the policy?

Mr. Mulroy: Yes, that last one.

The Court: Here, you can have them both.

Mr. Mulroy: This policy, Exhibit Number 2, was issued in consideration of a premium, and in return for that premium the company takes upon itself the burden of such insurance in the amount of \$104,000.00 for protection [14] and indemnity risks in respect to liability of the assured for claims for loss of life, injury or disability as per slip attached, and is warranted free of all other claims.

The Court: Well, if I understand the preliminary statement filed by the Fireman's Fund, there is no question about its terms, the amount involved, or the payment of the premium, or the fact that it was in force and effect at all times involved in this action.

Mr. Franklin: That is correct, Your Honor.

Mr. Mulroy: I next——

The Court: And the Fireman's Fund position, insofar as he being a member of the crew, or the boatswain, is simply that you refer the libellant to be on his proof.

Mr. Franklin: That is correct, Your Honor.

Mr. Mulroy: I have now certain sheets taken from the official log book of the Capillo, numbers

9, 10, 12, 13, 17 and 25. These are photostatic records of the log for the purpose of showing to the Court any mention that was made of the services of Oscar Carl Johnson, and, also, to show the fact that the ship was bombed and that she was at the time of her bombing subject to the orders of the naval authorities at Manila, and I offer this. Will you mark this for identification?

(Pages 9, 10, 12, 13, 17 and 25 from official log book of S.S. Capillo, marked Libellant's Exhibit No. 4 for identification.) [15]

The Court: Well, is there any question about the fact that after December 7, 1941, the ship was then, and at all times thereafter, subject to the orders of the naval authorities insofar as either the Fireman's Fund or the United States is concerned?

Mr. Franklin: No, Your Honor.

Mr. Evans: I do not believe there is any denial of that.

The Court: In other words, she could not have left Manila without the consent of the naval authorities.

Mr. Evans: I believe that is correct.

The Court: And there is not any question but what she was bombed and that the crew was interned.

Mr. Mulroy: It was controverted in the record here. Those things were controverted, and I now offer proof on them.

The Court: Will counsel concede it?

Mr. Franklin: We will concede that the bomb-

ing occurred December 27th, I believe the record shows, doesn't it, Mr. Mulroy, 1941?

Mr. Mulroy: I think it is the 29th, probably.

The Court: Well, the 27th or 29th, it does not make any difference.

Mr. Mulroy: Whatever is shown in the log.

The Court: Yes. [16]

Mr. Mulroy: Whatever the date is as shown in the log.

The Court: And that thereafter the entire crew, including Mr. Johnson, was interned?

Mr. Mulroy: Yes.

The Court: By the Japanese.

Mr. Mulroy: Yes.

The Court: And he remained interned until the day of his death.

Mr. Mulroy: Yes.

The Court: Is there any doubt about that?

Mr. Franklin: If I may interject, I think, as we mentioned in our memorandum, the evidence shows that Johnson was taken off the ship at Manila when it arrived there on November 27th because of sickness or illness; that the Capillo remained in Manila until the 27th, a month later, at which time the Japanese entered the city, bombed the ship, and the crew members on the ship were taken into custody; and sometime later Johnson, who had been ashore for a month because of his illness, was apparently captured by the Japanese and interned with the rest of them.

Mr. Mulroy: The log I am offering will show all this.

The Court: I understand, but if counsel is willing to concede it, why bother about the evidence?

Mr. Mulroy: He was taken ashore, according to the log, on the 28th of November.

The Court: All right. Now, does this show, also, the first occasion of the onset?

Mr. Mulroy: That shows that there was some heavy machine gunning a day or so before she was finally bombed.

The Court: No, I mean the onset of his incapacity.

Mr. Mulroy: It was before, yes. There had been no trouble before the time he went to the hospital.

Mr. Franklin: I think it shows, if Your Honor please, that at Port Moresby he was sent to the hospital.

The Court: Port Moresby, November 17th.

Mr. Franklin: Yes.

The Court: "Oscar Johnson, Boatswain, who had been sick several days, had doctor attention at Port Moresby. Medicine was supplied."

"Manila, November 28th. Oscar Johnson, Boatswain, was taken to St. Paul's Hospital at this port for treatment."

Well, does this show that he stayed there?

Mr. Mulroy: It does show that he stayed there, so far as the log could show that. That, of course, is the log prepared by the skipper of the *Capillo*, and it terminates, [18] I think, by the final entry of his death.

The Court: Yes. It says: "Manila, August 6th,

1943. Oscar E. Johnson, Boatswain, who has been very sick, and in the hospital since the vessel arrived at Manila November 28th, 1941, died August 6th at 9:00 p.m. He had had a hemorrhage. Johnson has a daughter, Betty Johnson, 8618 - 8th Avenue N.E., Seattle, Washington. He was cremated on August 9th, 1943."

All right.

Mr. Mulroy: Mark this as an exhibit.

(Order approving administrator's final report and petition for distribution in the matter of the estate of Oscar Carl Johnson, No. 93046, in the Superior Court of the State of Washington, in and for King County marked Libellant's Exhibit No. 5 for identification.)

Mr. Mulroy: This exhibit is a certified copy.

The Court: You have seen this, have you, counsel?

Mr. Franklin: No, I have not.

Mr. Evans: I have not seen that either. I would like to look at it, if I may.

(Exhibit in question exhibited to counsel of record.)

Mr. Mulroy: I offer this in evidence, if Your Honor please. [19]

Mr. Franklin: No objection.

Mr. Evans: No objection.

The Court: Admitted.

(Document previously marked Libellant's Exhibit No. 5 for identification received in evidence.)

LIBELLANT'S EXHIBIT No. 5

In the Superior Court of the State of Washington
In and For King County
In Probate No. 93046

In the Matter of the Estate of
OSCAR CARL JOHNSON,

Deceased.

ORDER APPROVING ADMINISTRATOR'S
FINAL REPORT AND PETITION FOR
DISTRIBUTION

This matter coming on regularly for hearing before the undersigned judge of the above entitled court, upon the 20th day of December, 1945, upon the petition of James G. Mulroy, administrator of the above entitled estate; and it appearing to the court that due notice of the time and place of this hearing has been duly and properly published and posted as requested by law, and the court having heard testimony in support of the said administrator's petition, and being in all matters fully advised thereon, finds as follows:

Upon the 6th day of August, 1943, the decedent, Oscar Carl Johnson, died intestate, at the Santa Catalina Hospital, Santo Tomas Internment Camp, Manila, Philippine Islands. The decedent had been a seaman, enrolled as a boatswain of the American Line Steamship "Capillo" which was destroyed by Japanese forces on or about December 8, 1941. At the time of his death he was a resident of Seattle, Washington, and left an estate in King County,

Washington, consisting of unpaid wages, and other allowances, due to him from his employers, the aforesaid American Mail Line Steamship Company, with its principal place of business in Seattle, Washington, aggregating \$2,629.12. In addition to the foregoing, the administrator has filed a claim against the Fireman's Fund Insurance Company for payment upon a blanket policy of life insurance believed to have covered the above named decedent as a member of the crew of the above mentioned Steamship "Capillo." This claim has not been paid and it may be necessary to institute litigation in order to collect the same.

Upon the 14th day of May, 1945, the petitioner was appointed administrator of the above entitled estate, has duly qualified as such, and at all times since has been and now is acting as such administrator.

Oscar Carl Johnson, the decedent herein, was a widower, and the following named person is his only surviving heir, to wit: Betty Jane Johnson Grant, residing in Chicago, Illinois.

Notice to creditors of the above named decedent was published as provided by law in the Daily Journal of Commerce, a newspaper of general circulation in King County, Washington, the date of first publication being the 15th day of May, 1945, and more than six months have elapsed since said date, and no claims whatever have been filed or presented to the administrator.

The administrator has heretofore caused an inventory of the property of this estate to be made

and filed in this proceeding, and appraisers duly appointed by this court have appraised said property and fixed the value thereof at the sum of \$2,629.12, which the administrator has collected from the aforesaid American Mail Line Steamship Company, and all of which is now in his possession.

There is no inheritance tax due to the State of Washington, nor to the United States of America from this estate.

In the administration of the above entitled estate the administrator has incurred and paid the following items of expense:

Filing Final Report	\$ 5.00
Filing fee	5.00
Publishing Notice to Creditors	4.53
Premium on bonds.....	30.00
Certified copies	2.80
Notice of hearing petition for distribution	4.20
<hr/>	
Total	\$51.53

The administrator has received no compensation for his services herein, and the foregoing expenses have been paid by him from his personal funds. The sum of \$125.00 should be and is hereby allowed to the said administrator in compensation for his services herein, and the foregoing expenses of \$51.53 are hereby allowed and the administrator is directed to compensate himself thereof from funds of the estate now in his possession.

And it appearing further to the court that there

may be additional property or funds which may come into the possession of the administrator, and that for that purpose this estate should remain, until the further order of the court, open for the purpose of administering such funds or property; Now, Therefore,

It Is Hereby Ordered that the final report and petition for distribution of James G. Mulroy, administrator herein, be and the same is hereby in all things approved.

It Is Further Ordered that the said administrator be and he is hereby awarded the sum of \$125.00 in payment for services rendered herein to date, and said administrator is allowed the sum of \$51.53 in payment of expenses aforesaid by him expended in the administration of this estate.

It Is Further Ordered that this estate remain open, subject to the further order of the court for the purpose of administering such further funds or property which may become a part of said estate.

It Is Further Ordered that the administrator herein, upon deducting from the funds now in his possession the aforesaid allowances totaling \$176.53, shall forthwith remit the balance of any and all funds now in his possession to the daughter of the decedent, Betty Jane Johnson Grant.

Done In Open Court this 20 day of Dec., 1945.

/s/ JOHN A. FRALEI,
Judge.

Presented by:

/s/ JAMES G. MULROY.

State of Washington,
County of King—ss.

I, Norman R. Riddell, County Clerk of King County, and ex-officio Clerk of the Superior Court of the State of Washington, for the County of King, do hereby certify that I have compared the foregoing copy with the original Instrument as the same appears on file and of record in my office and that the same is a true and perfect transcript of said original and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Superior Court at my office at Seattle this 11 day of August, 1950.

NORMAN R. RIDDELL,
Clerk.

[Seal] By /s/ WM. R. WELCH,
Deputy Clerk.

Admitted August 15, 1950.

Mr. Mulroy: I have asked on the next one, which is Paragraph V, denied by the—part of it was denied by the respondent, United States of America. I have asked for a production of the Second Seaman's War Risk, or a copy of it.

Mr. Evans: That is set forth in the Code of Federal Regulations. For the purpose of the record, it is set out in the 1934 Supplement of the Code of Federal Regulations beginning on page 2127.

The Court: Of what volume, or—

Mr. Evans Under Title 46, Book II of the 1934 supplement. Certain minor amendments, which I do not believe pertain to this case, are set out in the 1944 supplement beginning on page 3774.

It is my understanding that no policy, as we normally consider an insurance policy, was actually issued that one could take and put in the safety deposit box, but that these sections which I have referred to, the Code of Federal Regulations, are the terms of the second seaman's war risk policy.

Mr. Mulroy: And it indicates the parties covered by those policies. In other words, there is an automatic coverage.

Mr. Evans: That is correct.

The Court: According to the terms of the policy and the statute?

Mr. Evans: Yes. If any such policy is issued, these are the terms that cover such policy whether or not an actual policy is written up in one form or another.

The Court: Well, under the regulations is there some certificate that is given to the ship, or to the ship's company, or is it just automatic?

Mr. Evans: Under certain conditions it is automatic, is my understanding.

The Court: What are the conditions under which it became automatic?

Mr. Evans: That is one of the matters that the defense, as far as the Government is concerned,—

The Court (Interposing): Well, let us assume that he is not covered by it and was covered by the ship. Do you contend it did not cover the ship?

Mr. Evans: That it did not cover Oscar Carl Johnson.

The Court: Well, then, let us find out what you contend when it does become automatic. [21]

Mr. Evans: It is set out in what is commonly referred to in War Shipping Administration files as Public Law 17.

The Court: Is that 50 Appendix 1291 and 1292?

Mr. Evans: That is correct, Your Honor.

Mr. Franklin: If it would assist the court, I have an extra copy. I am not interested, but I happen to have it, if it would assist the court.

The Court: All right. 1291 and 1292. Apparently 1293, also.

Mr. Evans: The particular section that the Government intends to rely upon mainly is covered in Section 1292.

The Court: Well, what I am trying to get at now, when does the policy automatically become effective? Is that set forth in 1291 or 1292?

Mr. Evans: Well, I do not believe we have denied that the policy——

Mr. Mulroy: There is an admission, if Your Honor please, that the policy was issued, that is, that it did become effective. It is challenged that Oscar Carl Johnson was included in it.

Mr. Evans: Yes, I believe that is our position, that we do not deny that the policy covered the vessel, the crew members of the vessel, but we deny that it covered Mr. [22] Johnson.

The Court: Do you deny that it covered him at

all, or do you deny that it covered him in this particular situation?

Mr. Evans: I believe that we deny that it covered him in this particular situation, and, also, that it covered him at all after the date he left the ship.

The Court: Well, you tell me what your position is and maybe it will save me reading.

Mr. Mulroy: In regard to this policy?

The Court: Yes.

Mr. Mulroy: I will invite Your Honor's attention to Paragraph VI of the Libel.

"That said ss "Capillo" proceeded on her voyage and while in Oriental waters was attacked and destroyed by Japanese war operations on or about the 29th day of December, 1941, and thereafter all members of the crew of said vessel, including Oscar Carl Johnson, were interned and imprisoned in the Philippine Islands as acts of war by Japanese military forces."

That paragraph of the Libel, if Your Honor please, was admitted by both parties; that he was a member of the crew; that he was interned and imprisoned in the Philippine Islands as acts of war by Japanese military forces. If the policy covers any member of the crew, it covers Johnson [23] under that allegation.

The Court: I would still like to find the provision of the statute which makes this policy automatically effective.

Mr. Mulroy: Perhaps I can aid the Court. My conception of that automatic business—I must say

that I am not as firmly on my feet as I would like to be on that question, but I interpret it somewhat like this, subject to correction, that where there is a policy existing, that does not adequately cover the insured man, then the provisions of 1292 come into effect. We have that situation here. Your Honor will remember asking counsel, Mr. Franklin, if he admitted that the policy was in effect at the time the voyage was started and thereafter. And Mr. Franklin said—if I remember correctly, he said that was the case. So here we have a policy, commercial insurance, and that was much stressed, I think, in the file of correspondence and proceedings of the War Shipping Board, which under a stipulation was to be admitted in evidence,—

The Court: Well, let me see now, the so-called second policy, or whatever you call it, of the United States, is that liability does not attach unless other insurance is inadequate.

Mr. Mulroy: That is correct. But 1292 is written particularly where there is other insurance in effect. [24]

Now, it has been hinted to me—

The Court: In other words, must the Court make a determination as to whether or not the other policy is adequate?

Mr. Mulroy: Exactly.

The Court: In other words, suppose I should decide against you with relation to the Fireman's Fund? Would that then be considered inadequate?

Mr. Mulroy: Exactly, Your Honor.

The Court: That means we still have got to find when this law applies, when it attaches.

Mr. Mulroy: It has been hinted to me, Your Honor, that I overlooked something in not claiming a recovery under both policies, but I think such procedure would be grasping, and, besides, it might be difficult to sustain. So I have taken this position: All we ask is recovery under one policy or the other, and that is why Paragraph IX was inserted in the libel.

The Court: Oh, you are not seeking, then, recovery on both policies.

Mr. Mulroy: That is right. I am seeking recovery on one policy. It is my impression that the beneficiaries of this seaman are entitled to that coverage. I do not believe it was ever the intention of the writers of legislation, in respect to seamen taking war risk actions, that [25] they should be covered by two policies covering the same risk.

The Court: That is by Article I of the form which Mr. Franklin handed up to me here, Article I of the policy.

“The persons insured by this policy are the master, officers and crew of the vessel described on the face of this policy * * * entitled to coverage under this policy while such other insurance is in force and effect.”

Is that the clause you had reference to?

Mr. Mulroy: I have——

The Court: Or do you know?

Mr. Mulroy: Well, I must say that I am a little bit hazy about——

The Court: You are not nearly as foggy as I am about it.

Mr. Mulroy: In view of my recent active entry into the prosecution of this case, I have not been able to digest some of the verbiage used in those policies and in that legislation, but I have taken the position that we have an absolutely going and current life insurance policy, and we have a policy that will take effect if this is not sufficient; that is, the Government policy is one which automatically steps in and rights the wrongs, and that is what we are suing on. And I wish to say that I have——

The Court: Well the proof that you have [26] heretofore offered, then, is offered against the Government as well.

Mr. Mulroy: Oh, yes.

The Court: Insofar as it is applicable.

Mr. Mulroy: That is exactly it.

The Court: And now you rest, then, as to both the Government and the Fireman's Fund?

Mr. Mulroy: I have just a word more to say.

I have offered proof, I think, on every part of the complaint except under Paragraph IX.

“That there is existing some question as to which of the aforesaid policies of insurance are or were payable upon the death of Oscar Carl Johnson, and a judgment should be entered herein against such respondent as may be shown by the evidence at the trial of this action to be liable thereon.”

I think the fact that this lawsuit could be brought at all amply supports that allegation; but if it is insufficient, I feel sure that the contents of the file,

which has been agreed upon as being properly admitted in evidence,—

The Court: You mean the Government's file?

Mr. Mulroy: The Government's file, which was in an envelope.

The Court: Do you want that offered in evidence?

Mr. Mulroy: I am willing to have it offered [27] in evidence.

Mr. Evans: I will offer it, Your Honor.

The Court: All right.

Mr. Franklin: I have never seen it, if Your Honor pleases.

Mr. Evans: I only offer it so far as the defense of the respondent, United States of America, is concerned.

The Court: I think counsel is entitled to look at it, especially in view of the position taken both by the Government and Mr. Mulroy, that there is liability attaching upon the Government only if there is inadequate insurance otherwise. That appears to be quite a long file. We might have a recess while you look through it.

Mr. Franklin: Thank you, Your Honor.

(Whereupon a short recess was taken.)

The Court: Have you finished reading the exhibit?

Mr. Franklin: Yes, and we have no objection, if Your Honor pleases, to the admission of that exhibit in evidence.

The Court: Very well.

(Government file marked Respondent Exhibit A-1 and received in evidence.)

Mr. Mulroy: If Your Honor please, the [28] clerk has called my attention to the fact that certain of the exhibits to be offered in evidence were actually not tendered or admitted.

The Clerk: Three and four.

Mr. Mulroy: Three and four. I offer Exhibits 3 and 4 in evidence.

The Court: They are admitted. All exhibits which have been offered are now admitted; so if there are any you forgot to name, we are covered.

(Documents previously marked Libellant's Exhibits 3 and 4 for identification received in evidence.)

MUTUAL RELEASE

Official number
of vessel

219 904

LIBELANT'S EXHIBIT NO. 3

We, the undersigned, seamen on board the
 "Fortitude, Oregon"

SS CAPILLO

(Portion of)

to world ports

on her late voyage from

Fortitude, Oregon

for which articles were opened at Fortitude, Oregon

do hereby, each one for himself, by our signatures herewith given, in consideration of settlements made before the Shipping Commissioner at this port, release the master and owners of said vessel from all claims for wages in respect of the said past voyage or engagement, and I master of said vessel, do also release each of the seamen signing said release from all claims, in consideration of this release signed by them.

Dated 16 April 1945

Port of Seattle, Washington

ATTEST as to said master and the
 seamen whose signatures appear below.

Master.

U. S. GOVERNMENT PRINTING OFFICE: 16-7007

SEAMAN'S SIGNATURE	CONTINUOUS DISCHARGE CERTIFICATE OF REGISTRATION NO.	Rating	DATE OF WAGE COMPARISON SETTLEMENT	DATE OF WAGE COMPARISON SETTLEMENT	TOTAL WAGES PAID	TOTAL DEDUCTIONS	AMOUNT CLAIM REMAINDER (Settlement)
(Clarence O'Conner) - Protected Clarence O'Conner	095 348	2nd Asst.	10-11-41 12-23-41 (Detention Pay)	10-11-41 12-23-41 (Detention Pay)	201.25	118.20	73.00 423.10
Clarence O'Conner			12-30-41 3-19-45 (Reparation Pay & Bonus)	12-30-41 3-19-45 (Reparation Pay & Bonus)	201.25	774.04	427.50 7,747.46
Clarence O'Conner			3-20-45 4-8-45 (Reparation Pay & Bonus)	3-20-45 4-8-45 (Reparation Pay & Bonus)	201.25	30.48	65.42 248.03
Clarence O'Conner		3rd Mate	(Voyage Pay & Bonus) 10-11-41 12-23-41 (Detention Pay)	(Voyage Pay & Bonus) 10-11-41 12-23-41 (Detention Pay)	880.92	784.41	76.41
Clarence O'Conner			12-30-41 3-19-45 (Reparation Pay & Bonus)	12-30-41 3-19-45 (Reparation Pay & Bonus)	134.00	710.45	2,392.50 4,726.03
Clarence O'Conner		3rd Asst.	3-20-45 4-8-45 (Reparation Pay & Bonus)	3-20-45 4-8-45 (Reparation Pay & Bonus)	154.11	33.98	58.21 230.77
Clarence O'Conner	096 722		10-11-41 12-23-41 (Detention Pay)	10-11-41 12-23-41 (Detention Pay)	985.02	635.98	349.06
Clarence O'Conner		Deck Eng.	12-30-41 3-19-45 (Reparation Pay & Bonus)	12-30-41 3-19-45 (Reparation Pay & Bonus)	184.00	7,306.63	7,077.50 31.03
Clarence O'Conner			3-20-45 4-8-45 (Reparation Pay & Bonus)	3-20-45 4-8-45 (Reparation Pay & Bonus)	184.00	288.98	52.21 236.77
Clarence O'Conner			(Voyage Pay & Bonus) 10-11-41 12-23-41 (Detention Pay)	(Voyage Pay & Bonus) 10-11-41 12-23-41 (Detention Pay)	117.60	635.62	460.07 175.45
Clarence O'Conner			12-30-41 3-19-45 (Reparation Pay & Bonus)	12-30-41 3-19-45 (Reparation Pay & Bonus)	117.60	4,539.42	447.50 4,081.92
Clarence O'Conner			3-20-45 4-8-45 (Reparation Pay & Bonus)	3-20-45 4-8-45 (Reparation Pay & Bonus)	117.60	206.74	39.31 187.43
Clarence O'Conner		Master	10-11-41 12-23-41 (Detention Pay)	10-11-41 12-23-41 (Detention Pay)	(Voyage Pay & Bonus)	110.00	626.50 442.97 83.33
Clarence O'Conner	0-70 646	Tender	12-30-41 3-19-45 (Reparation Pay & Bonus)	12-30-41 3-19-45 (Reparation Pay & Bonus)	249.57	427.60	3,422.17
Clarence O'Conner			3-20-45 4-8-45 (Reparation Pay & Bonus)	3-20-45 4-8-45 (Reparation Pay & Bonus)	110.00	198.99	37.23 161.76
Clarence O'Conner		2nd Mate	(Voyage Pay & Bonus) 10-11-41 12-23-41 (Detention Pay)	(Voyage Pay & Bonus) 10-11-41 12-23-41 (Detention Pay)	25,902.96	902.96	- -
Clarence O'Conner			12-30-41 3-19-45 (Reparation Pay & Bonus)	12-30-41 3-19-45 (Reparation Pay & Bonus)	201.25	774.96	736.00 1,036.96
Clarence O'Conner		Mass	3-20-45 4-8-45 (Reparation Pay & Bonus)	3-20-45 4-8-45 (Reparation Pay & Bonus)	201.25	310.46	116.96 193.60
Clarence O'Conner	1-21 037		(Voyage Pay & Bonus) 10-11-41 12-23-41 (Detention Pay)	(Voyage Pay & Bonus) 10-11-41 12-23-41 (Detention Pay)	87.50	601.01	471.56 128.46
Clarence O'Conner			12-30-41 3-19-45 (Reparation Pay & Bonus)	12-30-41 3-19-45 (Reparation Pay & Bonus)	87.50	3,350.42	3,166.00 218.42
Clarence O'Conner		Ch.	3-20-45 4-8-45 (Reparation Pay & Bonus)	3-20-45 4-8-45 (Reparation Pay & Bonus)	87.50	180.33	34.04 146.29
Clarence O'Conner		2nd Mate	(Voyage Pay & Bonus) 10-11-41 12-23-41 (Detention Pay)	(Voyage Pay & Bonus) 10-11-41 12-23-41 (Detention Pay)	230.00	115.67	678.11 478.66
Clarence O'Conner			12-30-41 3-19-45 (Reparation Pay & Bonus)	12-30-41 3-19-45 (Reparation Pay & Bonus)	230.00	3,898.67	3,324.58 560.11
Clarence O'Conner		1st Mate	3-20-45 4-8-45 (Reparation Pay & Bonus)	3-20-45 4-8-45 (Reparation Pay & Bonus)	230.00	346.22	- -
Clarence O'Conner	11-207		(Voyage Pay & Bonus) 10-11-41 12-23-41 (Detention Pay)	(Voyage Pay & Bonus) 10-11-41 12-23-41 (Detention Pay)	230.00	1,811.69	674.33 604.35
Clarence O'Conner			12-30-41 3-19-45 (Reparation Pay & Bonus)	12-30-41 3-19-45 (Reparation Pay & Bonus)	230.00	3,347.42	501.56 27
Clarence O'Conner			3-20-45 4-8-45 (Reparation Pay & Bonus)	3-20-45 4-8-45 (Reparation Pay & Bonus)	230.00	734.58	68.28 56.27

MAY 18 1945

Walter Johnson

Walter Johnson

Walter Johnson

Walter Johnson

Walter Johnson

Walter Johnson

Walter Johnson

Walter Johnson

RIDER TO ARTICLES

THE AMERICAN MAIL LINE AGREES TO PAY AN AGENCY FARE BONUS TO THE CREW OF THE C.S. CASILLO, VOYAGE 6, IN ACCORDANCE WITH PROVISIONS CONTAINED IN THE APPLICABLE SUPPLEMENTARY AGREEMENTS IN EFFECT BETWEEN THE PACIFIC AMERICAN SHIPOWNERS' ASSOCIATION AND THE VARIOUS MARINE UNIONS.

IN THE EVENT THE VESSEL AND/OR CREW BE INJURED, IMPRISONED, HOSPITALIZED OR PUT ABOARD DUE TO WAR CASUALTIES AND FOR THAT REASON, BE UNABLE TO CONTINUE THEIR VOYAGE, THE COMPANY AGREES TO PAY WAGES AND BONUS TO THE LATE MEMBERS OF THE CREW ARRIVE IN AN UNWELL STATES PORT, OR THE PACIFIC COAST: FURTHERMORE, THE COMPANY AGREES, IN SUCH EVENT, TO ARRANGE FOR REPARATION OF EACH MAN TO AN UNITED STATES PORT, OR THE PACIFIC COAST. ALSO, THAT THE COMPANY BE LIABLE FOR ANY INJURIES SUFFERED BY ANY CREW MEMBER DUE TO WAR CASUALTIES.

THE COMPANY AGREES TO REIMBURSE EACH MAN SO AFFECTED BY THE AMOUNT OF \$150.00 IN THE EVENT OF LOSS OF PERSONAL EFFECTS BY ANY MEMBER OF THE CREW DUE TO NECESSITY OF ABANDONING THE SHIP RESULTING FROM TORPEDOING, MINING, BOMBING, SINKING, SCUTTLING OR ANY OTHER WAR CAUSERS, WHICH RESULTS IN THE SHIP WRECK OF THE VESSEL.

THE COMPANY ALSO AGREES TO CARRY WAR RISK INSURANCE IN THE AMOUNT OF \$2,000.00 FOR EACH MEMBER OF THE CREW, AGAINST LOSS OF LIFE AS A RESULT OF WAR CASUALTIES.

IT IS FURTHER AGREED THAT IN THE EVENT OF ANY INCREASE IN PAY, OR OTHER BENEFIT OR WAR BONUS, WHICH MAY BE GRANTED, AS THE RESULT OF NEGOTIATIONS BETWEEN THE UNION AND THE PACIFIC AMERICAN SHIPOWNERS' ASSOCIATION, THE COMPANY WILL BE COVERED BY THE TERMS AND EFFECTIVE DATE OF ANY AGREEMENT TO BE MADE.

X.O. Preyer
MASTER

John D. Bunker
DEPUTY U.S. SHIPPING COMMISSIONER

November 28th
Oscar Johnson Boatswain sent to

Hospital at Manila.

A. B.

Herman Cook promoted to Boatswain
starting November 28th.

X.O. Preyer
Master

Admitted August 16, 1960.

LIBELLANT'S EXHIBIT No. 4

Page 9

Official Log of the Capillo from Westport, Ore.,
Towards Oriental Ports

Honolulu, Oct. 27

On arrival at Honolulu—vessel received orders from U. S. Navy Officials to proceed to Manila via Torres Strait and Malukka passage necessary charts were received for the intended voyage. Vessel also received fuel oil and fresh water, all tanks were filled to capacity.

/s/ K. O. DRYER,
Master.

/s/ C. A. LUNDQUIST,
Chief Officer.

.....
Chief Engineer.

Port Moresby, New Guinea, Nov. 17th

Upon arrival at Port Moresby it was found necessary to go alongside for fresh water (boiler) as a lot of condenser trouble had been experienced on the voyage from Honolulu to Port Moresby.

/s/ K. O. DRYER,
Master.

/s/ C. A. LUNDQUIST,
Chief Officer.

.....
Chief Engineer.

Page 10

Port Moresby, Nov. 17th

Oscar Johnson, boatswain, who had been sick several days, had Doctor attention at Port Moresby. Medicine was supplied.

/s/ K. O. DRYER,
Master.

/s/ C. A. LUNDQUIST,
Chief Officer.

Manila, Nov. 28th

Oscar Johnson, boatswain, was taken to St. Pauls Hospital at this Port for treatment.

/s/ K. O. DRYER,
Master.

/s/ C. A. LUNDQUIST,
Chief Officer.

Manila, Nov. 29th

Herman Cook, A. B., was this day promoted to Boatswain taking the place of Oscar Johnson.

/s/ K. O. DRYER,
Master.

/s/ C. A. LUNDQUIST,
Chief Officer.

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Official Log of the S. S. Capillo
Manila, Nov. 29th

Donald H. Buchalen, O. T., was this day promoted to Able Seaman.

/s/ K. O. DRYER,

Master.

/s/ C. A. LUNDQUIST,

Chief Officer.

Manila, Jan. 4th, 1942, Noon

Dec. 29th the S. S. Capillo was heavily bombed. Caught fire in the after end of the vessel. At 1 p.m. vessel was abandoned. All members of the crew was landed at Corregidor Isl., where the vessel had been anchored 4 days.

/s/ K. O. DRYER,

Master.

/s/ C. A. LUNDQUIST,

Chief Officer.

Page 13

Towards Santo Tomas Internment Camp

On Dec. 25th, 2:30 a.m. received orders from U. S. Navy Dept. to move the vessel to an anchorage at Fort Mills Corregidor. Left Manila Harbor at about 3:45 a.m.

Vessel was anchored at Corregidor as per Navy Orders.

Bombing raids over Corregidor every day.

Dec. 29th, 8:00 a.m., went ashore to find out from Navy authorities if they could advise a safer anchorage for the vessel.

NOTE: (The cargo was consigned to the Army and Navy.) I was told or advised to stay where

I was, as the vessel was under the protection of the Corregidor guns. Returned to the vessel at 11:50 a.m., at that time machinegun planes came over the vessel, and 3 heavy bombs hit the vessel aft, at # 4-5 hatches. Fire started immediately. Vessel was abandoned about 12:45 p.m.

/s/ C. A. LUNDQUIST,
Chief Officer.

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Manila, Nov. 12th, 1942

Received a short censored note from Harold Rogers (messman) from Cabanatuan Military Camp, no other information.

/s/ K. O. DRYER,
Master.

/s/ C. A. LUNDQUIST,
Chief Officer.

Manila, Aug. 6th, 1943

Oscar E. Johnson, boatswain, who has been very sick, and in the Hospital since the vessel arrived at Manila, Nov. 28th, 1941, died Aug. 6th at 9:00 p.m. He had a bad hemorrhage. Johnson has a daughter, Betty Johnson, 8618-8th Ave., N.E., Seattle, Wash. He was cremated on Aug. 9th, 1943.

Witnesses:

/s/ CARL A. LUNDQUIST,
Chief Officer.

/s/ P. B. NEUBAUER.

/s/ EVERETT S. S. CARP.

Mr. Mulroy: I file with the clerk certain stipu-

Admitted August 15, 1950.

lations to the admission of these exhibits, if Your Honor please.

The Court: Very well, they may be filed.

Mr. Mulroy: And, if Your Honor please, I have consulted with counsel for both respondents and they have agreed that I may offer a further exhibit, being a letter of November 7th, 1946, from the War Shipping Board.

(Letter from United States Maritime Commission, New York, New York, to James G. Mulroy, Esq., 1410 Hoge Building, Seattle 4, Washington, marked Libellant's Exhibit No. 6 for identification and received in evidence.)

LIBELLANT'S EXHIBIT No. 6

United States Maritime Commission
New York, N. Y.
45 Broadway

November 7, 1946

Airmail

James G. Mulroy, Esquire
1410 Hoge Building
Seattle 4, Washington

Dear Mr. Mulroy:

Re: Mulroy v. Firemen's Fund Insurance
Company and U. S. of America, No.
14918
SS Capillo

This will acknowledge receipt of your letter of November 1, 1946.

Our records do not contain any reference to the

above named seaman as a deceased former crew member of the SS Capillo. We are therefore unable to answer your questions specifically. Generally we may say that no beneficiaries were designated by crew members of the SS Capillo when signing on for her last voyage.

As you no doubt know this vessel was insured in the commercial market rather than by this office. Payment therefore, by U. S. Maritime Commission if made would be gratuitous and would be under the provisions of Public Law 17-78th Congress. In cases considered for payment under this law, when no beneficiary designations were found, payment has been authorized in some instances to next-of-kin, within the degree of relationship permitted by Article 7 of the Second Seamen's War Risk Policy, if it could be established that a bonafide case of dependency existed. Such payment was also contingent on definite declination of liability by the commercial underwriters.

We trust that the above will answer the questions you had in mind; however, if not please do not hesitate to communicate with us again.

Very truly yours,

W. H. CANTWELL,

Chief Adjuster,

Division of Insurance.

/s/ J. C. SIMPSON

By: R. F. MORROW,

Assistant Chief Adjuster.

Received by mail Nov. 13, 1946.

Admitted August 15, 1950.

Mr. Mulroy: This is offered by way of [29] showing that as of that date the War Shipping Administration had no record of the decedent, Oscar Carl Johnson, and that completes the proof for the libellant, if Your Honor please, and the libellant rests.

The Court: You may proceed.

Mr. Franklin: If Your Honor pleases, on behalf of respondent, Fireman's Fund Insurance Company, we move at this time that the libel be dismissed with prejudice, insofar as Fireman's Fund Insurance Company is concerned, upon the ground that the evidence tendered by the libellant fails to establish any cause of action against respondent, Fireman's Fund Insurance Company.

The burden of proof, of course, is upon the libellant to establish affirmatively that the death of the decedent occurred within the terms of the policy which Fireman's Fund Insurance Company admitted having issued in this particular case.

I do not propose at this particular time, unless the Court wishes, to argue the motion extensively other than to argue and call the Court's attention to the very basic fact that there is no evidence at all that the deceased, Johnson, died under circumstances which would bring him within the restricted terms of the war risk policy issued by Fireman's Fund Insurance Company.

This is not a general accident policy. This [88] is not a life insurance policy, but this is a war risk policy free of all other claims except those enumerated, and the enumerated hazards appearing in the insuring clause are those the result of capture,

seizure, destruction or damage by men of war, piracy, takings at sea, arrests, restraints and detentions and other warlike operations and acts of Kings, Princes and Peoples in prosecution of hostilities, whether before or after declaration of war, and so forth.

Now, the evidence affirmatively introduced by the libellant establishes that prior to the declaration of war, which occurred on December 7th, 1941, Pearl Harbor Day, the deceased, who was a boatswain on the vessel, had become sick and ill; that enroute from Honolulu to Port Moresby, New Guinea, his illness was such that he had to see a physician at Port Moresby; that when the vessel reached Manila on November 27th, 1941, long prior to any declaration of any war, the deceased was removed from the vessel because of illness, was sent to St. Paul's Hospital and remained continuously in Manila in various hospitals, never rejoining the ship, until his death from natural causes August the 7th, 1943.

This decedent was not even on the ship at the time it was subjected to the war risk for which this policy was issued, and the war risks which this policy covers are only war risks which affect a crew member because of the capture, the seizure, the destruction of the vessel. Here, [89] if Your Honor pleases, the evidence shows that this man was taken off the vessel prior to the time that any war risk hazard effecting the vessel covered by the policy occurred.

Your Honor will observe, when you have an opportunity of reading the Government's file, that the

War Shipping Administration agreed that there was no coverage under Fireman's Fund policy. That is why they agreed that under Public Law 17 they would then consider granting relief to the administrator of Johnson, and they did consider it, and they would have granted him relief but they found that the necessary dependency had not been proven by the daughter. That is the only ground on which the Government rejected the claim for second seaman's war risk.

The Court: Well, as I read the statute, it is necessary for a person to be covered by the Government policy to designate a beneficiary, unless there is found to be a ground of dependency. In other words, it does not seem to me, in reading the statute, to be strictly automatic.

Mr. Franklin: The point that I am making, if Your Honor please——

The Court: Do they by that policy—in other words, under 1128 it has to appear to the Commission that the insurance is adequate.

Mr. Franklin: 1128?

The Court: Well, 1128 of Title 46. [32]

“That insurance is inadequate for the needs of transportation in the water-borne commerce of the United States, and so forth, and cannot be obtained on reasonable terms and conditions from companies authorized to do an insurance business in a state of the United States”—that would appear to be a preliminary prerequisite before the attachment of Government insurance—“unless by the promulgation of this form of policy the commission

thereby made a determination that it appeared to the commission that insurance was inadequate and could not be obtained.

Mr. Franklin: Well, if Your Honor pleases——

The Court: And Article I, the persons insured.

“Any person or persons insured under any other or similar policy shall not to the extent of such prior coverage be entitled to coverage under this policy while such other insurance is in force and effect.”

Mr. Franklin: Yes.

The Court: Now, your insurance was in force and effect?

Mr. Franklin: It was in force. Let us put it that way.

The Court: Well, it was in force.

Mr. Franklin: But not in legal effect. Now, if Your Honor pleases, that situation——

The Court: Well, now just a moment. [33]

If it was in force and effect, it does not mean that it was in force and effect as to Oscar Carl Johnson.

Mr. Franklin: No.

The Court: It means it was in force and effect as to the members of the crew who were covered by it.

Mr. Franklin: Yes. That is right, Your Honor.

The Court: Your sole position is that Johnson was not covered by the insurance——

Mr. Franklin: Yes.

The Court: ——because he had left the boat and because he became ill from a natural cause rather than as a result of war.

Mr. Franklin: Yes. And, furthermore, that position received administrative approval from the War Shipping Board in the processing of Johnson's claim. As Your Honor will note from the file, there was some question raised initially by the War Shipping Administration as to whether this Fireman's Fund policy was not in effect and would preclude further consideration under Public Law 17 by the Administrator, and the War Shipping Administration resolved that question and held that the policy issued by Fireman's Fund did not cover Johnson, and then went a step further and considered whether Johnson was entitled to benefits under 1292, where the administrator is given that authority when he is not otherwise adequately provided for by insurance, [34] and they held that the beneficiary did not show dependency. For that ground only did the Government deny liability.

The Court: That question does not enter into your——

Mr. Franklin: Except as an administrative construction by the War Shipping Administration of the effect of the Fireman's Fund policy.

The Court: Yes. But I mean to say, whether or not Betty Lou Johnson, or whatever her name is, is a dependent——

Mr. Franklin: That does not enter into my situation.

The Court: Well, on your motion for a judgment at this stage of the game, all presumptions and inferences must be indulged against the maker of the motion.

Now, what evidence do I have here? I have the

log of the ship that on November 17th Oscar Johnson, boatswain, who had been sick several days, had a doctor at Port Moresby. Medicine was supplied. Then 11 days later, Manila, November 28th, Oscar Johnson, boatswain, was taken to St. Paul's Hospital in this port for treatment. Then—well, 10 months later, August 6th, Oscar Johnson, boatswain, who had been very sick, and in the hospital since the vessel arrived at Manila, November 28th, 1941, died August 6th at 9:00 p.m. He had a bad hemorrhage.

Mr. Franklin: Yes, Your Honor. [35]

The Court: And there is the doctor's statement that he did not have tuberculosis; that he had an abscess; that the doctor recommended——

Mr. Mulroy: A lobectomy.

The Court: In other words, cutting his ribs out.

Mr. Franklin: No, cutting open and draining the lung out. He had an abscess of the lung.

The Court: And there was no medical skill or facilities available for that purpose. This was recommended on or about March 3rd, which was six months before his death.

I think that at this stage of the proceedings I will have to indulge in inferences and presumptions against you and deny your motion.

Mr. Franklin: Well, I do not wish to belabor the point, but I wish to call the Court's attention to two things. First of all, that this man's illness has not resulted—there is no showing it resulted from any war risk hazard insured against; in other words, the risks insured against were not the proximate causes of this man's illness; therefore, the policy could not be effective.

Secondly there is no showing that the man did not receive proper medical treatment because of any of the risks insured against. Those risks are risks that are the result of damage to the vessel, if Your Honor pleases, something [36] involving the bombing or sinking or something of that sort. This man's illness developed naturally, and weeks before the bombing. The bombing had nothing to do with it. Therefor, if Your Honor pleases, we submit that the proximate cause of this man's illness is not shown to be the result of any risk insured against.

The Court: It is the proximate cause of his death with which we are here concerned, not his illness.

Mr. Franklin: That is true, but as I view the situation, he suffered from a progressive malady and the consequence of it is that he died. Now, the burden is upon counsel to show affirmatively, not by speculation or conjecture, but by probative evidence that the cause of this man's death was a risk insured against in our policy, and he has failed to do so.

The Court: Well maybe ultimately he will fail to do so, but at this stage of the proceeding I have got to indulge all the inferences and presumptions in his favor.

Your policy covers war risk—warlike operations. Certainly the bombing of the ship was a warlike operation, and his internment was a warlike operation. I have got to indulge the presumption that the ship being bombed could not go out, and he could not go out with it.

I have to indulge a presumption that on and after he was sent ashore, or interned, which was January 8th, [37] 1942, he was completely beyond his own control insofar as getting any medical attention is concerned; and, also, that within three months of that date—it was the only medical evidence that I had—a lobectomy would have been effective; in other words, would have prevented his death.

Mr. Franklin: Well, I am unable to concede that this medical report of Dr. Robinson is sufficiently definite or positive in terms to establish, as a matter of proof, that had this man had his lobectomy he would have recovered.

The Court: At this stage of the proceedings it is sufficient, when I have got to weigh all the scales against you and in favor of the libellant.

Mr. Evans: I should like to move at this time to challenge the sufficiency of the evidence likewise, Your Honor, on behalf of the United States of America. I would like to adopt the grounds stated by Mr. Franklin and in addition challenge the sufficiency of the evidence, first, as to any proof of authority of the libellant in this action to bring the action.

The libellant sues as administrator of the estate of Oscar Carl Johnson.

The Court: There are no certified copies of letters of administration.

Mr. Evans: Well, I believe the certified [38] copy of the order which has been introduced recites that such was.

The Court: Well, all right.

Mr. Evans: I am not disputing that he is the proper administrator, but I am disputing whether or not he has authority to bring this action.

There is set out in Paragraph II of the amended libel, the last part there of—it says:

“that this action is brought by him in the interest, behalf and for the exclusive benefit of the decedent’s said daughter and only child.”

I find no proof in the certified copy of the order which was introduced as Libellant’s Exhibit 5, or any other proof, that this action is brought exclusively for the daughter of the decedent.

(Argument of counsel for the United States of America in support of motion.)

The Court: The motion is denied.

It is now 12:00 o’clock. How long will you be with your evidence?

Mr. Franklin: If Your Honor pleases, I may have one or two witnesses. They will be quite short. I am quite sure it will not be over half an hour on direct, cross, redirect and recross.

The Court: Do you have some?

Mr. Evans: I haven’t got any witnesses, Your Honor.

The Court: You have not any witnesses. Well, I am frankly puzzled about just how far the United States is or is not in this case. I will think about it during the noon hour. We will recess until two o’clock.

(Thereupon, at 12:00 o’clock noon, court proceedings in the above entitled matter were recessed until 2:00 o’clock p.m. same day.) [40]

August 15, 1950, 2:00 o'clock P.M.

The Court: You may proceed.

Mr. Franklin: Respondent, Fireman's Fund, would like to call Dr. Slyfield.

FREDERICK SLYFIELD

called as a witness by and on behalf of respondent, Fireman's Fund Insurance Company, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Franklin:

Q. Would you state your name, please?

A. Frederick Slyfield.

Q. What is your calling?

The Court: Frederick what?

The Witness: Slyfield, S-l-y-f-i-e-l-d.

Q. (By Mr. Franklin): What is your calling?

A. Diseases of the heart and lungs.

Q. Are you a physician and surgeon?

A. Physician.

Q. How long have you been a physician?

A. Thirty years.

Q. What medical school or college are you a graduate of? [41]

A. The College of Medicine of the State University of Iowa, and of the Royal College of Surgeons, Edinburgh.

Q. I see. And following graduation did you specialize in any particular field?

A. Yes, sir. My work is limited to heart and lungs.

(Testimony of Frederick Slyfield.)

Q. How long have you limited your professional practice to that specialty?

A. Twenty-five years.

Q. And at the present time, Doctor, you are engaged in that practice in the City of Seattle?

A. I am.

Q. Are you connected with any institutions, patients suffering from lung conditions and diseases?

A. Yes, sir; I am Medical Director of the Laurel Beach Sanatorium.

Q. How many patients are currently treated at that institution? A. One hundred.

Q. Doctor, did you ever know, to your knowledge, Oscar Carl Johnson, the deceased in this case?

A. I did not know him.

Q. Now, would you kindly examine Libellant's Exhibit 1, to which is attached a copy of a medical report by Dr. Robinson, and I will ask you if you have seen previously a copy of that report. [42]

A. I have. I went over the copy which you handed to me.

Q. Yes. And based upon the copy that you have of Dr. Robinson's report, can you reach a conclusion as to the precise cause of Mr. Johnson's death?

A. The cause of death was a pulmonary abscess—abscess of the lung.

Q. Now, will you advise us, Doctor, what is an abscess of the lung?

A. An abscess of the lung is a pocket of pus

(Testimony of Frederick Slyfield.)

which develops within the lung as a direct result of some infection other than tuberculosis.

Q. Is there anything in the report of Dr. Robinson which supplies the key to the source of the infection? A. The source of the infection?

Q. Yes. A. No.

Q. I see. Now, Doctor, have you had experience yourself treating patients with an abscess of the lung? A. Yes, sir.

Q. Many times? A. Many times.

Q. Now, referring, Doctor, to the treatment given for that condition between December of 1941 and August of 1943, what was—or what was the usual type of treatment given a [43] sufferer of a lung abscess?

A. Well, during that period, and for a far longer period, up until the time of penicillin, the treatment consisted either of medical or of surgical treatment.

Q. I see. Now, would you state what the medical treatment consisted of for that condition?

A. Well, it consisted largely of rest and general care; certain drugs we used, which were ineffective, and postural drainage; that is, we would have the patient lie in the position which he found he could best drain the abscess. He would bring up the pus more readily in certain positions.

Q. Doctor, what were the prognosis of successful treatment of a patient suffering from a lung abscess during the period mentioned by the methods you have just testified to?

(Testimony of Frederick Slyfield.)

A. It was recognized as an extremely hazardous condition, and I should say the results varied in different parts of the country, but it was around 75 per cent. I mean to say——

The Court: Fatal?

The Witness: 75 per cent of the lung abscess patients died.

Q. Now, was there a surgical approach to that condition in 1941 which was considered standard practice? A. There was.

Q. Will you state what that was? [44]

The Court: 1942, I think.

Mr. Franklin: I beg your pardon.

Q. (By Mr. Franklin): 1941, 1942 and up until August, 1943. A. It is the same today.

Q. I see.

A. The procedure consisted briefly of a two stage operation. It was necessary to open the chest between the ribs, sometimes taking out a section of a rib, and sewing the lung to the chest wall, and then a few days later going in, right into the lung abscess and inserting a rubber tube for adequate drainage.

Q. What are or were the results of that type of operation, Doctor, with reference to fatalities?

A. It was also very hazardous and it was assumed that the patient had about one chance in three of surviving.

Mr. Franklin: That is all. Thank you, Doctor.

The Court: You may cross-examine.

(Testimony of Frederick Slyfield.)

Cross-Examination

By Mr. Mulroy:

Q. Doctor, I did not clearly get your name. Would you mind spelling it for me?

A. S-l-y-f-i-e-l-d.

Q. Slyfield. [45] A. Right.

Mr. Mulroy: I should like to have that case history.

Mr. Franklin: I have got a copy of it here.

(Document in question presented to Mr. Mulroy.)

Q. (By Mr. Mulroy): Doctor—there is just only a small part of this case history that interests me. Did you ever hear of a Dr. Canizares?

A. I think not.

Q. He is described in this exhibit as the leading thoracic surgeon in the Philippines.

A. I noticed that.

Q. You read that? A. Yes.

Q. Will you tell me, is a thoracic surgeon the same sort of a professional man as you are?

A. No. He would be interested in the same things, but I am an internist.

Q. You are what?

A. I am an internist; that is to say, I don't do the surgery. I work out the case and determine what should be done and the surgeon does the mechanical end of it.

Q. So you are not a thoracic surgeon.

A. That is right.

(Testimony of Frederick Slyfield.)

The Court: In other words, your relationship to a patient would be similar to that of Dr. Robinson?

A. Yes, sir; that is right.

Q. (By Mr. Mulroy): Now, you testified that the operation spoken of here—that is a lobectomy, is it not, the operation you have described? That is a lobectomy, is it?

A. Lobectomy is mentioned here, yes.

Q. Well, is the operation you speak of——

A. No, that is a different procedure.

Q. That is a different procedure?

A. That is right.

Q. Then you have not testified as to a lobectomy, have you? A. That's right.

Q. The operation which you have described, you say it is a very hazardous undertaking and that there is a 66 and two-thirds chance against the patient living. Do you mean by that that two-thirds of them will perish on the operating table or shortly thereafter, or will they live several years and then die of the results of the operation?

A. If the record shows that statement, I think I got it turned around. What I should have said, and what I meant to say, and what the fact is, that about 33 and a third per cent of those patients, prior to the advent of penicillin, have died; 33 and one-third per cent of the surgical cases have died.

Q. Prior to penicillin? A. Right.

The Court: Then the chance of living with such an operation was three to one—two to one.

The Witness: Two to one.

(Testimony of Frederick Slyfield.)

Q. (By Mr. Mulroy): I think you testified also, although I must say I did not clearly hear you at first until I changed my position, I think you testified as to when the administration of penicillin came into general use. When was that?

A. Oh, that was about 1943, I think.

Q. Do you remember about what date it was in 1943?

A. No.

Q. You would not say the first part of 1943?

A. No; I couldn't even be sure of the year. I know we used it as early as possible, but I have forgotten exactly when it was.

Q. You used it yourself?

A. I have.

Q. Penicillin is administered how?

A. By intramuscular injection. It is shot into the muscle with a syringe.

Q. The upper part of the leg?

A. Usually in the buttock, but it doesn't matter where you put it. [48]

Q. And that is an injection?

A. Right.

Q. You were using that in 1943, were you?

A. As I say, I am not quite sure when we began its use, but it was being used sometime in 1943.

Q. It was available in the United States in 1943?

A. Yes, sir.

Q. That is, generally available in hospitals and to medical practitioners?

A. I am not sure about the time.

The Court: It was not as plentiful as now?

The Witness: No. It was seven dollars and a half a vial.

(Testimony of Frederick Slyfield.)

The Court: Do you have any knowledge as to whether or not it was available through—available to somebody interned in the Philippines?

The Witness: I wouldn't know.

The Court: You would not know?

The Witness: No.

Mr. Mulroy: That is all, Doctor.

Mr. Evans: I just have one question, I believe.

Q. (By Mr. Evans): Doctor, I believe you described an operation which you did not give a name to, at least if the name was given to it I do not recall what it was. Does that operation have a [49] name, the one which you have described?

A. Well, no, I think not, but it would be spoken of as a rib resection and then putting a tube into the abscess.

Q. Now, a lobectomy is referred to in the report which has been shown to you as one of the exhibits in this case. Can you advise us as to the difference between a lobectomy and the operation which you have described?

Mr. Mulroy: If Your Honor please, I think it is proper to object to that question inasmuch as the doctor has testified that he is not a surgeon and, also, that there was not a lobectomy—he did not testify as to a lobectomy.

The Court: Objection overruled. This is cross-examination, and it is not his witness.

A. There is practically no similarity.

Mr. Mulroy: This is direct—redirect, if anything.

(Testimony of Frederick Slyfield.)

The Court: This is not the Government's witness.

Mr. Mulroy: Very well.

The Court: Tell us what a lobectomy is, if you know.

The Witness: The right lung has three lobes. A lobectomy consists of the acquisition, the cutting out of one of the lobes. Obviously in this case it would be the right lower lobe. That is where the abscess was. [50]

Q. (By Mr. Evans): As I understand that, that lobe, then, is removed entirely from the body?

A. That is right.

Q. Can you give us any information as to the chances of recovery from such an operation?

A. I think the patient would most certainly have died very shortly because in a lobectomy, after the abscess has continued for a time, you almost always get an infection of the lower space in which the lung lies, and that calls for resection and the tube into the empyema space; and there is terrific toxemia, and usually the patient doesn't survive very long.

Q. Now, you previously gave us some estimates as to the chances of recovery on the operation which you previously mentioned. Do you have any information as to figures of a similar type on a lobectomy?

A. I have not—I have no statistics, sir, but I have seen a lot of it and my impression is that in a case like this a lobectomy would have hastened the

(Testimony of Frederick Slyfield.)

man's death because of the wide-spread and terrific infection associated with a lung abscess.

The Court: It would depend upon the stage at which the lobectomy was performed, would it not?

The Witness: That would be a factor.

The Court: Of course, this man died in August. If a lobectomy were performed as early as March, would that have made a difference?

The Witness: Possibly. But in any case, the important fact is that a lung abscess is present, and when you have a lung abscess, it is one of the worst things we have to deal with. You have to cut through infection to remove a lobe, and when you cut through an infected area, everything in the neighborhood is promptly infected and the situation is often much worse, and many a surgeon has wished he had never seen the case.

The Court: You said that an abscess was caused by some infection other than tuberculosis. That might be the after effect of a cold?

The Witness: Yes, sir.

The Court: Pneumonia?

The Witness: Right.

The Court: And foreign substances in the lung?

The Witness: Inhaled, yes.

The Court: Inhaled?

The Witness: Yes.

Q. (By Mr. Evans): Doctor, I see in the report a statement about bronchial asthma. Would a patient who was suffering from such an affliction be more or less likely to recover from a lobectomy, or

(Testimony of Frederick Slyfield.)

would it have any effect on his chances of recovery at all? [52]

A. You mean the presence of bronchial asthma?

Q. Yes.

A. That was an error in diagnosis. That is quite clear as you study the case.

Q. I see. From a review of the exhibit which is before you, I believe, would you in your professional judgment have recommended a lobectomy at any time during the periods mentioned there, or do you have sufficient information from that report to make such a statement?

A. As I study the case, I feel I would have advised against it.

Mr. Evans: I see. I have no further questions.

The Court: As I understand your position, you would never recommend a lobectomy for an abscess?

The Witness: For an abscess, that is right. We recommend it in tuberculosis sometimes.

The Court: Is that all?

Mr. Franklin: Yes. May the Doctor be excused?

The Court: As far as I am concerned, yes.

(Witness excused.)

Mr. Franklin: The respondent, Fireman's Fund, desires to call Captain Dreyer. [53]

K. O. DREYER

called as a witness by and on behalf of the respondent, Fireman's Fund Insurance Company, being first duly sworn, was examined and testified as follows:

(Testimony of K. O. Dreyer.)

Direct Examination

By Mr. Franklin:

Q. Would you state your name, please?

A. Dreyer, initials K. O.

Q. What has been your calling?

The Court: Oh, your last name is Dreyer?

The Witness: That is right.

The Court: And your first initial is "K"?

The Witness: K. O. Carl Olaf, that is my name.

The Court: Carl Olaf?

The Witness: That is right.

Q. (By Mr. Franklin): What has been your occupation? A. I am a seafaring man.

Q. Have you been a master?

A. I have held a master's license since 1923.

Q. Are you sailing at the present time, Captain?

A. No, sir.

Q. Have you sailed since you were evacuated from the prison camp in Manila?

A. I made one trip in 1946. [54]

Q. Captain, in October, 1941, to what vessel were you attached? A. To the steamer Capillo.

Q. In what capacity? A. Master.

Q. Whom was the vessel being operated by?

A. American Mail Line.

Q. Did you leave on a trip, Captain, which you thought was for Shanghai? A. Yes, sir.

Q. About when and where did you leave the Pacific Northwest? A. When and where?

Q. Yes, approximately.

(Testimony of K. O. Dreyer.)

A. We left on the 18th of October, 1941, from Astoria, Oregon.

Q. Who was the boatswain aboard the vessel?

A. Oscar Johnson.

Q. Now, had Oscar Johnson sailed with you previously on some other ships?

A. He sailed with me in 1938 on a Weyerhaeuser ship. I was Chief Officer at that time and he was a sailor at that time.

Q. Now, Captain, where did the vessel go from Grays Harbor? What was its next port of call?

A. We left originally from Westport.

Q. Oh, Westport, Oregon.

A. And we stopped at Astoria, where we received orders to proceed to Honolulu and sail to Shanghai.

Q. I see. Now, did you stop at Honolulu, Captain?

A. Yes, sir.

Q. Then what was your next port of call?

A. Port Moresby, New Guinea.

Q. Did anything happen to the health of the boatswain, Mr. Johnson, from the time the vessel left Honolulu until it reached Port Moresby?

A. Yes. About three or four days out, I couldn't tell you exactly, he took very sick and could not work any more, and he was hospitalized. We put him in the hospital that was on the ship.

Q. In the ship's hospital?

A. Yes.

Q. Now, Captain, what were his symptoms of illness that you saw?

(Testimony of K. O. Dreyer.)

A. Well, heavy coughing, and spitting blood, and so on.

Q. What happened to his condition as you approached Port Moresby? Did it improve or not?

A. No, he was getting worse and worse. We came to Port Moresby. We were really not supposed to stop at Port Moresby. [56]

Q. May I ask you, Captain, where is Port Moresby located?

A. In the southern part of New Guinea.

Q. Well, was your stop at that port made necessary by Mr. Johnson's illness?

A. Not entirely by Mr. Johnson's illness, because the engineer needed water, and putting the two things together, I thought it was a good opportunity to go in there and have him taken care of.

Q. Did the doctor come on the vessel or did Mr. Johnson go ashore?

A. No, the doctor came on the vessel.

Q. Was Mr. Johnson at that time in condition, do you think, to have gone ashore for medical treatment?

A. He should have gone there, but the doctor advised me that it was not the proper place for me to send him to a hospital because he had no facilities with which to take care of him.

Q. Physically, Captain, was Mr. Johnson able to have gone ashore and visited the doctor at his office in Port Moresby, or was his physical condition such that the doctor had to come aboard?

A. The doctor had to come aboard; and if he

(Testimony of K. O. Dreyer.)

had gone ashore, we would have had to carry him ashore.

Q. Now, did you receive any instructions from the doctor [57] in Port Moresby as to what kind of treatment Mr. Johnson needed at that time?

A. No, but he told me the best he could do was give me some medicine which consisted of some pills and, so far as I remember, some powders to be taken in water, and that would relieve his pain and coughing, and probably he would be better off to stay on the ship until we arrived in Manila where he could get proper hospital care.

Q. Captain, about what was your running time from Port Moresby to Manila? A. Ten days.

Q. During that 10 days what was Mr. Johnson's physical condition?

A. He was fairly good the first three days, but then he started back again, started to cough heavily, and usually—not exactly blood. There was blood in the spit. And my opinion about him, he was in such a condition that if the ship had been on the trip four or five days longer he would have been buried at sea. He was in very bad condition.

The Court: Did he have a fever?

The Witness: Yes, sir, he had fever. We took his temperature at times there.

The Court: You took his temperature?

The Witness: Yes, sir.

The Court: What was it? [58]

The Witness: Well, about a hundred or a hundred and one at times.

(Testimony of K. O. Dreyer.)

Q. (By Mr. Franklin): In view of his critical condition, what did you do with reference to obtaining medical treatment for him as soon as the vessel reached Manila?

A. Well, I broke one of the regulations. I was not supposed to send out any radio messages, but I wired into Manila to the Company's agent, to have the doctor ready on our arrival, and then when we arrived there the doctor's boat was alongside immediately and he was taken ashore.

Q. When was that Captain; what date?

A. The 28th of November.

Q. Where was Mr. Johnson taken, if you know?

A. Lazaro, or some name.

Q. The log entry shows St. Paul's Hospital.

A. Well, I am telling you, I am not sure whether it was St. Lazaro's or St. Paul's.

Q. I see. Now, did Mr. Johnson do any work on the ship at any time from the time the vessel left Port Moresby up until the time he was taken off at Manila?

A. No. He was not out of his room.

Q. After Mr. Johnson left the Capillo, did you reappoint somebody else as boatswain?

A. Yes, sir.

Q. Now, did Mr. Johnson at any time after November 27th, [59] 1941, rejoin the Capillo?

A. No.

Q. Was Mr. Johnson aboard the vessel at the time the Capillo was bombed by the Japanese?

A. No.

Q. December the 27th?

A. The 29th.

(Testimony of K. O. Dreyer.)

Q. December 29th, 1941?

A. No, he wasn't.

Q. You were aboard the vessel at that time, were you, Captain? A. Yes.

Q. And as a result of that, was the ship destroyed by bombing?

A. Not exactly destroyed. She took fire.

Q. I see. And then what happened to you and the various members of the crew?

A. Well, we left the ship and landed at Corregidor, and we stayed there until December the 31st, when we managed to get transportation into Manila on a tow boat.

Q. Captain, where was the vessel at the time of the bombing? Was it lying in Corregidor?

A. At Corregidor.

Q. How far is that from the harbor or the City or Manila? A. About 26 or 27 miles. [60]

Mr. Franklin: That is all. Thank you, Captain. These other gentlemen will ask you some questions.

The Court: Do you wish to adopt him as your witness on direct?

Mr. Evans: May I wait until after the cross-examination to decide that?

The Court: No, I think you had better make up your mind now and then counsel can examine on both of your direct——

Mr. Evans: I will adopt this witness as my witness, and I would like to adopt the testimony that has been given. I have no further direct.

(Testimony of K. O. Dreyer.)

The Court: Very well, you may cross-examine.

Cross-Examination

By Mr. Mulroy:

Q. You testified, Captain Dreyer, that Mr. Johnson sailed with you on other trips?

A. It was on another ship.

Q. On another ship? A. Yes.

Q. What was his position on the other ship?

A. Seaman.

Q. Did he appear at that time to be healthy or not?

A. Well, Mr. Johnson never looked very healthy at any time. [61]

Q. He did all his work as a seaman?

A. Oh, yes.

Q. And he did all his work as a boatswain up to the time he got sick, is that right?

A. That is right.

Mr. Mulroy: That is all, Captain.

Mr. Franklin: May the Captain be excused?

The Court: Yes. Were you interned in the same camp with Mr. Johnson?

The Witness: Yes, sir.

The Court: Did you see him while you were there?

The Witness: Yes, sir. The last time I saw him was in May, 1943, when I was removed from that camp and sent to another camp.

The Court: Did he have medical attention there?

The Witness: In the hospital?—In the camp?

The Court: In the camp.

(Testimony of K. O. Dreyer.)

The Witness: He had as much medical attention as he probably could get under the circumstances.

The Court: Well, what was it?

The Witness: Well, it was not what I would call the best.

The Court: What kind of food was there?

The Witness: Well, it was not the best, either.

The Court: Well, what was it? What did he have to eat and you have to eat?

The Witness: Well, mostly rice and beans and very, very little meat.

The Court: Did you lose weight?

The Witness: I did.

The Court: How much did you lose?

The Witness: Well, from 180 to 121.

The Court: 180 to 121?

The Witness: That is right.

The Court: Did Mr. Johnson lose weight?

The Witness: He did.

The Court: Do you know how much he lost?

The Witness: I don't know.

The Court: Did all the men lose weight?

The Witness: Everybody lost weight.

The Court: Everybody lost weight?

The Witness: Yes.

The Court: What was the medical attention; Japanese doctors?

The Witness: No.

The Court: Filipino doctors?

The Witness: No, we had our own doctors. This Dr. Robinson was a missionary doctor.

(Testimony of K. O. Dreyer.)

The Court: Missionary? [63]

The Witness: Yes. And he was also interned.

The Court: Well, how many sick people did he have to take care of?

The Witness: Oh, quite a few, but there were two or three other doctors in camp that helped him out. But Dr. Robinson was the leading man.

The Court: How many people were interned there altogether?

The Witness: At that time when I was there about three thousand.

The Court: Three thousand?

The Witness: Three thousand.

The Court: You had several other members of your crew there, didn't you?

The Witness: All of them except four or five, I think it was.

The Court: All of the crew died there?

The Witness: No, five altogether.

The Court: Five died there altogether?

The Witness: Yes.

The Court: They lost weight, did they?

The Witness: Oh, yes.

The Court: Dysentery?

The Witness: Dysentery—well, what I call malnutrition. [64]

The Court: Malnutrition?

The Witness: Yes.

The Court: Was Mr. Johnson a big eater?

The Witness: I don't know.

The Court: Well, I mean when he was on the boat.

(Testimony of K. O. Dreyer.)

The Witness: I—I was sitting down eating with him, but I never noticed.

The Court: You had good food on the boat?

The Witness: Oh, yes; the best.

The Court: You say he had a fever all the time?

The Witness: At that time he had—when he was sick.

The Court: That is when he took sick out of Honolulu?

The Witness: That is right. We were not professional doctors, but we treated him the best we could.

The Court: You treated him as if it were a cold?

The Witness: Yes. We gave him some tablets, and whether we did right or wrong I couldn't tell you, because we were not doctors and we really didn't know what was wrong with the man. And he never told any of us until later about this. When it was time for me to leave Santo Tomas Camp, I spoke to Dr. Robinson, and Mr. Johnson at that time had told [65] Dr. Robinson that years ago he had worked in some mine, or digging a tunnel, and the dust had settled on his lungs. But he never told me or any of his shipmates what was wrong with him.

The Court: Well, on this previous voyage, how long was that before this one?

The Witness: That was in 1938.

The Court: 1938?

The Witness: Yes, sir.

(Testimony of K. O. Dreyer.)

The Court: Was he sick then?

The Witness: Well, he was sick. Of course, it was on a coastal ship and Mr. Johnson—I don't know what was wrong with him, and in a case like that, when a seaman gets sick, he just comes up and asks for a hospital certificate and goes up to the Marine Hospital, and that is what he did in Baltimore in 1938.

The Court: You did not know what was wrong with him?

The Witness: At that time I didn't.

The Court: It might have been the flu.

The Witness: I don't know. We lived pretty good on merchant ships.

The Court: I see. I do not think I have any other questions. The witness may be excused.

Mr. Evans: Your Honor, in view of the additional [66] phases that have been opened up by the Court's questions, I would like to have the opportunity to further question this witness.

The Court: All right.

I think I would like to have Dr. Slyfield back or are you going to have another doctor?

Mr. Franklin: No, I did not plan to.

The Court: I just noticed that the onset of this was on, say, about November 1st, 1941, and he lived for 23 months.

All right, go ahead, Mr. Evans.

Redirect Examination

By Mr. Evans:

Q. Captain, as I understand, you were interned by the Japanese about what date?

(Testimony of K. O. Dreyer.)

A. I, myself, was interned on January the 9th. The rest of the crew were interned on January the 6th, 1942.

Q. Now, by the rest of the crew are you including Mr. Johnson in that, too?

A. No. Johnson was—was—he had been in the hospital, and when I came into Manila from Corregidor on December 21st, the Company's agents—he was ordered to the hospital and the Company's agents had sent him to the Oriental Hospital, where I saw him, and at that time he looked pretty [67] good. But then on January the 6th the Japs put us all—put all the crew in the concentration camp, Johnson included.

The Court: You say he looked pretty good?

The Witness: Yes.

The Court: You mean he was sitting up?

The Witness: Sure.

The Court: Walking around?

The Witness: That is right.

The Court: He was not bed ridden?

The Witness: No. That was on the 31st of December.

The Court: The 31st of December?

The Witness: The 31st, or the 1st of January.

Q. (By Mr. Evans): Now, at the time you were interned, and particularly referring to Mr. Johnson, you were not in the Death March and put in the same concentration camp as the prisoners taken by the Japanese in Corregidor, were you?

(Testimony of K. O. Dreyer.)

A. No.

Q. You were separate and apart from that group?

A. Yes. We were treated as civilian personnel.

Q. Do you recall what agency or department of the Japanese Government had charge of your prison camp?

A. Well, it was civilian Japanese in the first year I was in there that had charge of the camp. I haven't got the names of any of them. [68]

Q. During that period of time did you lose any weight?

A. Oh, yes; not too bad, though, because the first year in there the food was fairly good, but after a year or so the military took it over and they cut out everything.

Q. Well, up until the time that the military took over, were you allowed to buy certain fresh fruits and vegetables from the natives?

A. Yes. The natives were allowed in camp, but after the military took it over, they were not allowed in.

Q. Now, do you recall when the military took over?

A. Well, it was before May, 1943, anyway.

Q. You were removed from the camp where Mr. Johnson died at some time?

A. May 16th I was moved to a camp they called Los Bamos.

Q. May 16? A. Yes.

Q. Now, the military had taken over before that? A. Yes.

(Testimony of K. O. Dreyer.)

Q. Then, as I understand, you were not in the same camp with Mr. Johnson at the time he died?

A. No, but my chief officer was there and the Company's agent.

Q. Now, I don't suppose you know how much weight you lost up until the time the military took over?

A. No, I couldn't tell you exactly. [69]

Q. But the conditions during that period of time, as I understand it, were not too bad.

A. Not too bad. The first year was not too bad, when you consider yourself a prisoner of war.

Mr. Evans: That is all.

Mr. Mulroy: I have nothing further.

The Court: Any redirect?

Mr. Franklin: No redirect.

The Court: The witness may be excused. Call your next witness.

Mr. Franklin: The respondent, Fireman's Fund Insurance Company, rests its case. I notice that Your Honor mentioned about having Dr. Slyfield available. He has gone back to his office, I assume, and I can ask my associate, Mr. Holland, to call him up and try and get him back. I do not know whether he will cooperate.

The Court: Well, the only thing I had in mind was to see whether or not his opinion—he did not express it in connection with the severity of this abscess, the onset, which was, as I say, on or about November 1st, 1941, and the man lived for 22 months afterward.

(Testimony of K. O. Dreyer.)

Mr. Franklin: Do you think the evidence warrants that inference as to when the abscess developed? The evidence is that he became ill and sometime before his death he did develop a lung abscess, but not that he had a lung abscess [70] at the time the vessel——

The Court: Is the inference warranted that he developed a lung abscess after internment?

Mr. Franklin: No, I couldn't say that.

I think we will attempt to recall Dr. Slyfield.

The Court: It is up to you. I don't care.

Mr. Evans: I would like very much to have him recalled, Your Honor.

The Court: Well, then, we will have—do you have any other witnesses?

Mr. Franklin: I have no further witnesses. We will rest our case, unless we can get Dr. Slyfield here.

The Court: All right, then, we will have a recess and you will see if you can get him here.

(Whereupon, a recess was taken.)

Mr. Franklin: May we recall Dr. Slyfield?

FREDERICK SLYFIELD

a previous witness in behalf of the respondent, Fireman's Fund Insurance Company, and having been duly sworn, was recalled and testified further as follows:

Redirect Examination

By Mr. Franklin:

Q. Doctor, it has been testified by the master of

(Testimony of Frederick Slyfield.)

the vessel, Captain Dreyer, that Mr. Johnson became ill between the time the vessel left Honolulu—I do not have the exact [71] date—and some 10 days later when the vessel reached Port Moresby; that during this 10-day interval he was feverish; had a temperature of around 102; that he was coughing and spitting blood; that he was seen by a physician in Port Moresby who suggested he should be hospitalized as soon as possible; there being no facilities at Port Moresby, the vessel continued on to Manila, reaching Manila November 27th, 1941, where Mr. Johnson was immediately taken off the ship and transferred to St. Paul's Hospital where he remained until sometime before—about January the 1st of 1942, at which time he was seen by Captain Dreyer who had observed that he was walking around and felt and looked much better. Now, assuming those facts to be true, Doctor, and basing your answer upon the report of Dr. Robinson as to the subsequent history in the case, I will ask you if you can form any opinion as to when the lung abscess from which Mr. Johnson died first developed.

A. We have to determine that, Mr. Franklin, on the basis of the record of the symptoms.

Q. Yes.

A. Knowing subsequently that the man had a lung abscess, certainly we should date it back to the beginning of the symptoms.

Q. And that would be when, Doctor?

(Testimony of Frederick Slyfield.)

A. November, on the ship, when he had fever and coughing and spitting of blood. [72]

Q. Now, Doctor, are there periods when the patient will have a remission of symptoms?

A. That is the usual thing. A lung abscess is a pocket of pus. Eventually the abscess bursts into the bronchus and drains, and for a time that is the same as putting a tube into the abscess. You get good drainage. And so long as you have good drainage the patient may feel reasonably well, but it will fill up again.

Q. I see. Doctor, is there anything unusual in the fact that Mr. Johnson developed a lung abscess, we will say, in November of 1941 and lived until August of 1943?

A. Nothing unusual, no, sir. If there is good bronchial drainage, that is, if a man can cough up the pus, he may live for a considerable period of time—sometimes years.

The Court: Would malnutrition have anything to do with his resistance to the course of the disease?

The Witness: Well, I think it would be a very minor factor.

The Court: Well, assume that he was interned in Santo Tomas Camp from January 1st, 1942, until the date of his death in August, 1943, and that during that entire period of time other men lost as much as 60 pounds due to lack of proper nutrition, and that Mr. Johnson had the same kind of food. Would that make any difference? [73]

(Testimony of Frederick Slyfield.)

A. The answer seems obvious, Your Honor, but I think it would be a minor factor because you have to deal with a very serious infection and unless that infection can be conquered you are not going to get anywhere with any amount of food.

The Court: Well, does malnutrition affect any disease?

The Witness: Not necessarily. Of course, if a man starves to the point of complete exhaustion, presumably he would die sooner of that infection, whatever it might be. But as I read the excellent resume of the situation by Dr. Robinson, my impression was that this man complained of food only in one camp where he lived for a matter of a few days and asked to be transferred back to where he had been and where the food was better. That is my impression.

The Court: Now, in the outline as given to you by Mr. Franklin, assume that this was first diagnosed as a lung abscess in August, 1942, but a year before he died and almost a year after the onset of the disease; would that make any difference in your conclusion?

The Witness: No, sir.

The Court: Your opinion would be that he still had the lung abscess in November, 1941?

The Witness: Yes, sir. A hemorrhage of the lungs is due to very few things. An automobile accident, [74] fractured ribs, will do it. He didn't have that. Cancer of the lungs will do it. He didn't have that. Bronchiectasis, that was ruled out. Tuberculosis will do it. That was ruled out.

(Testimony of Frederick Slyfield.)

The Court: Pneumonia?

The Witness: I beg your pardon?

The Court: Pneumonia?

The Witness: Usually not. You get a rusty sputum. But as I understand, this man spit up blood. That means lung abscess.

The Court: Cross-examination?

Mr. Mulroy: No cross-examination.

The Court: Do you have any further questions?

Mr. Evans: No, I have no further questions.

The Court: All right, I guess this time you may be excused. Thank you for coming back again, Doctor.

Mr. Franklin: The respondent, Fireman's Fund, rests.

Mr. Evans: The Government rests, Your Honor.

The Court: Any rebuttal?

Mr. Mulroy: I have no rebuttal, if Your Honor please.

The Court: The plaintiff rests?

Mr. Mulroy: The plaintiff rests. [75]

(Arguments were then made by counsel for the respective parties.)

COURT'S ORAL DECISION

The Court: Judgment will be for the libelant against the Fireman's Fund.

On the Government end of it, I do not go along with the construction made by the Maritime Commission that the matter of dependency is the stand-

ard which determines their liability at all. But I do not find any statement before me, nor has any been called to my attention, of which I can take judicial notice, which would bring this case within the provisions of Section 1128 of Title 46; that is to say, that it appeared to the Commission that the insurance was adequate for the needs of transportation—in other words, that they had not made any finding that insurance was inadequate or cannot be obtained on reasonable terms and conditions. The insurance went into effect on the date of the policy, and it would have to be that date, that is to say, October 17, 1941, that the Commission would have had to make such a finding; so [76] I think the libelant is not entitled to judgment against the Government for that reason.

Now, whether or not Fireman's Fund has an action over, or against the Government on account of some contract, or because of some finding which they have made and which is not before me now, I cannot say. But the judgment will be for the libelant against the Fireman's Fund in the principal sum of the policy, five thousand dollars, and it will be against the libelant and for the Government on the claim of the libelant for relief, if any is set forth in the libelant's complaint.

Mr. Franklin: There will be no interest allowance, will there, if Your Honor please? This matter was held up for several years because of Mr. Mulroy's absence in Germany.

The Court: I think there ought to be an interest allowance from the date of judgment.

Mr. Mulroy: If Your Honor please, if there is a disallowance of interest due to my absence in Germany, that is decidedly improper because at all times I have been represented here and all of the delay in this case has been due to the Government having different exceptions which were never brought up for hearing, although I was always willing to have them heard. Any delay was due to waiting on administrative processes at the request of the Government.

The Court: What is the legal rate of interest in Washington?

Mr. Mulroy: Six per cent, if Your Honor please.

The Court: When was this filed?

Mr. Mulroy: This was filed in——

The Court: 1946?

Mr. Mulroy: 1946. I think it was in April of 1946.

The Court: Well, in any event, I do not think you should have interest prior to the date of filing your suit.

Mr. Mulroy: Very well, Your Honor.

The Court: So interest will be from the date of filing suit, April 12th, 1946.

Mr. Franklin: May I be heard, if Your Honor please?

The Court: Are you going to talk me out of it again?

Mr. Franklin: No, but I feel that a very substantial injustice is being done in allowing that interest against Fireman's Fund. We have been ready at all times to try this. Mr. Mulroy was in

Europe. I am prepared to testify, and my file will show, that on numerous occasion I tried to get the case set. Mr. Mulroy was in Europe. He had Mr. Jarvis here who said, "Please wait until Mr. Mulroy comes back." And under those circumstances, if Your Honor please, [78] I think it is a substantial injustice to assess interest against me.

Mr. Mulroy says the delay was due to the Government, yet Your Honor awarded the interest against us. I think it is highly inequitable to award interest against us at any time prior to the date of judgment. We have been ready and willing at all times to try this case.

The Court: Well, I will tell you what perhaps I had better do is to refrain from making any order in the matter of interest at this time. I am, of course, not familiar with this calendar here. Judge Bowen is. I will consult with him as to the approximate date this case could have been tried, and if it appears that it was delayed due to either party's fault, I will take that into consideration in determining whether or not I shall allow interest or shall not allow interest.

Mr. Franklin: Well, if Your Honor wants a showing under oath, I would like to testify, because I have been intimately associated with the case; that I have been anxious at all times to get the matter disposed of; and that insofar as Mr. Mulroy's relations with the Government are concerned, I have no knowledge or information, but I have been ready and the reason the case was not tried was because Mr. Mulroy was in Europe for three years.

Mr. Mulroy: I wish to say something in regard to that, if Your Honor please. This case was filed in April of 1946, and I left for Germany in June of 1947, and in the course of that time the Government had filed exceptions. Those exceptions I was at all times ready to argue, and I consulted Mr. Pellegrini about it. Those exceptions have since been withdrawn. They had no merit. They had no merit then, now, or at any time, and the delay—I agree with Mr. Franklin, to the extent that he was ready to try and I was ready to try, but it was held up pending an administrative settlement; and, as a matter of fact——

The Court: Who sought the administrative settlement? You?

Mr. Mulroy: I did not, no. Mr. Pellegrini suggested it.

The Court: Who is he? I do not know him.

Mr. Mulroy: He was representing the Government.

Mr. Evans: He was my predecessor, Your Honor.

The Court: Oh.

Mr. Mulroy: And, as as matter of fact, if Your Honor please, there was never any answer filed by the Government.

The Court: On the matter of exceptions to libel, they can be brought on for argument at any time, counsel.

Mr. Mulroy: The case was not at issue, if Your Honor please. [80]

The Court: No, but if they file exceptions, you

dispose of them. You do not have to wait four years to dispose of exceptions to a libel.

Mr. Mulroy: I have always been ready to dispose of them.

The Court: When they were disposed of, then the matter could have been put at issue. When was it finally at issue?

Mr. Mulroy: I cannot give you the exact date, if Your Honor please, but the record will show there.

Mr. Evans: Sometime in June, 1949.

Mr. Mulroy: It was not actually at issue until June of 1949, Your Honor.

The Court: Well, the Government's answer is filed June 27th, 1949, the answer to the amended libel.

When was the case set for today?

Mr. Mulroy: About two months ago, if Your Honor please.

If Your Honor please, this case could have been heard before I went to Germany, but it was never brought to issue.

The Court: Mr. Franklin, suppose you make your showing on the matter of delay.

Mr. Franklin: Yes.

The Court: I do not think you need to be sworn. [81] You are a member of the bar here, and I presume that members of the bar tell the truth until I find out to the contrary.

Mr. Franklin: If Your Honor please, I am associated with the firm of Bogle, Bogle and Gates, attorneys for Fireman's Fund Insurance Company.

The libel was served upon us in this case and we filed our appearance on the 20th day of April, 1946; that we were at all times ready to proceed to trial thereafter; that we had, of course, nothing to do with the relations between the administrator and his efforts against the United States of America; that this case was originally set for trial in 1946, I believe, or July 8th, 1947, before visiting Judge Foley of Phoenix, Arizona.

The Court: Foley of Nevada.

Mr. Franklin: Nevada, yes. But upon the statement of Mr. Pellegrini, then representing the Government, that the matter was being administratively considered, that setting was vacated; that thereafter the writer attempted on numerous occasions to get a date for the trial of the case; that the matter was referred, in Mr. Mulroy's absence, to a Mr. Jarvis; that the writer held numerous conferences with Mr. Jarvis, at which time Mr. Jarvis advised that the matter be held in abeyance pending the expected return of Mr. Mulroy to this country, and that the respondent, Fireman's Fund, has been ready and willing at all times to litigate this case from the time the matter was first at issue, and that the [82] delay in the trial of this case has not been at any time due to any conduct or action on the part of Fireman's Fund Insurance Company.

The Court: Your associate has another bulletin for you.

Mr. Franklin: Yes.

Here are some letters. I am not familiar with these letters, but here is letter by Mr. Jarvis to Mr.

Pellegrini dated October 22nd, 1947, asking that the matter be—well, it is an offer of settlement. That is what this letter is. And here is another one from Mr. Jarvis under date of January 29th, 1948, where Mr. Jarvis says: "Our correspondent in Chicago has requested I inform him of the present progress." There were apparently, some settlement negotiations that were delaying the matter insofar as——

The Court: In other words, negotiations between the Government and the libellant?

Mr. Franklin: Yes, Your Honor; so that the sum total of all this is that we have been prejudiced by this delay and will be prejudiced by any allowance of interest beyond the date of judgment.

The Court: Do you know whether or not during your absence there was an effort to secure administrative settlement of this?

Mr. Mulroy: I do not know that there was any effort made by Mr. Jarvis who represented me at that time.

The Court: Well, of course, this correspondence runs on up here until 1947.

Mr. Mulroy: The denial or disallowance of any settlement by the Government was dated, I think, the 27th of June, 1947.

The Court: June, 1947. But here is another long statement, November 5th, 1947.

I will take the matter of interest under advisement and let you know in a day or so.

The prevailing side will prepare findings of fact and conclusions of law.

Mr. Franklin: Might I supplement my statement by offering in evidence these two letters?

The Court: Yes. They may be filed. They need not be offered in evidence, but they may become part of the file.

(Concluded.) [84]

Certificate

I, Bernard Ayres, do hereby certify that I was the official court reporter in the above-stated court on August 15th, 1950; that the above is a full, true and correct transcript of the proceedings, including testimony of witnesses, all objections, motions and exceptions of counsel.

/s/ BERNARD AYRES,
Court Reporter.

[Endorsed]: Filed November 15, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO APOSTLES
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled Court do hereby certify that I am transmitting as the Apostles on Appeal in the above-entitled cause all of the original papers in the file dealing with the above-entitled action or proceeding, together with

Libelant's Exhibits Numbered 1 to 6, inclusive, and Respondent's Exhibit Numbered A-1, the same being the complete record on file in said cause; and that said original papers and exhibits hereby transmitted constitute the apostles on appeal and cross-appeal from the Decree of Court filed and entered August 31, 1950, to the United States Court of Appeals at San Francisco, California, and are identified as follows:

1. Libel in Personam filed Apr. 3, 1946.
2. Praecipe for process, filed Apr. 3, 1946.
3. Appearance of libelant, filed Apr. 3, 1946.
4. Stipulation for Costs filed Apr. 4, 1946.
5. Marshal's Return on Citation, filed Apr. 12, 1946.
6. Appearance of Respondent, Fireman's Fund Insurance Company, filed Apr. 22, 1946.
7. Answer of Fireman's Fund Insurance Co., filed Apr. 22, 1946.
8. Cost Bond of Fireman's Fund Insurance Co. filed Apr. 22, 1946.
9. Appearance of Proctors for the United States of America, filed Apr. 26, 1946.
10. Exceptions of Respondent United States of America to Libel in Personam, filed July 24, 1946.
11. Government Note for Motion Docket, filed July 24, 1946.

12. Further Exceptions of Respondent to Libel in Personam.

13. Government Memorandum of Authorities in Support of Exceptions, filed Aug. 22, 1946.

14. Note for Motion Docket, filed Aug. 22, 1946.

15. Libelant's Motion for Leave to Amend Libel, filed Sept. 26, 1946.

16. Note for Motion Docket, filed Sept. 26, 1946.

17. Letter from United States Maritime Commission to James G. Mulroy, filed Mar. 31, 1947.

17(a). Amended Libel in Personam, filed Sept. 29, 1947.

18. Answer to Amended Libel in Personam, filed June 27, 1949.

19. Demand of Respondent's Fireman's Insurance Co. for Genuineness of Documents, filed June 8, 1950.

20. Stipulation for taking testimony of Betty Jane Johnson Grant, filed July 19, 1950.

21. Reply to Answer of Respondent, United States of America, filed Aug. 1, 1950.

22. Answer to Betty Jane Johnson Grant to interrogatories, filed Aug. 8, 1950.

23. Answer to Libelant's Amended Libel, filed Aug. 9, 1950.

24. Libelant's Notice to Produce, filed Aug. 9, 1950.

25. Stipulation for Admission in Evidence of Exhibits, filed Aug. 14, 1950.

26. Trial Memorandum of Respondents Fireman's Fund Insurance Company, filed Aug. 14, 1950.

27. Stipulation for Admission in evidence of exhibits, filed Aug. 15, 1950.

28. Notice to Produce and Stipulation filed Aug. 15, 1950.

29. Letter from D. H. Jarvis to Frank A. Pellegrini, dated Jan. 29, 1948, filed Aug. 15, 1950.

30. Motion to Vacate Minute entered Order dated Aug. 16, 1950, filed Aug. 17, 1950.

30(a). Memorandum of authorities in support of Motion to Vacate, filed Aug. 21, 1950.

31. Supplemental Memorandum of Fireman's Fund Insurance Company, filed Aug. 21, 1950.

32. Notice of Presenting Decree, filed Aug. 23, 1950.

33. Findings of Fact and Conclusions of Law, filed Aug. 31, 1950.

34. Decree of District Court, filed Aug. 31, 1950.

34(a). Proposed Order Dismissing United States of America (unsigned) Lodged Aug. 31, 1950.

35. Cost Bond of Libelant filed Sept. 11, 1950.

36. Statement of Points relied upon and designation of record, filed Oct. 24, 1950.

37. Assignment of Errors, filed Oct. 24, 1950.

38. Notice of Appeal by Respondent Fireman's Fund Insurance Company, filed Oct. 24, 1950.

39. Citation on Appeal, filed & issued Oct. 24, 1950.

40. Motion for Order of Transmittal of original exhibits on appeal, filed Oct. 24, 1950.

41. Supersedeas and Cost Bond filed Oct. 25, 1950.

42. Reporter's Transcript of Testimony, filed Nov. 15, 1950.

43. Notice of Cross-Appeal of Libelant, filed Nov. 20, 1950.

44. Bond for Costs on Cross-Appeal, filed Nov. 20, 1950.

45. Statement of Points Relied upon and Designation of Record, filed Nov. 20, 1950.

46. Assignment of Errors of Cross-Appellant, filed Nov. 20, 1950.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the appellant and cross-appellant for preparation of the apostles on appeal in this cause, to-wit:

Notice of Appeal, respondents.....\$5.00

Notice of Cross-Appeal, Libelant.... 5.00

I certify that the above fees have been paid to me by the proctors for the respective parties.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 22nd day of November, 1950.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12755. United States Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Co., a Corporation, Appellant, vs. James G. Mulroy, as Administrator of the Estate of Oscar Carl Johnson, deceased and United States of America, Appellees. James G. Mulroy, as Administrator of the Estate of Oscar Carl Johnson, deceased, Appellant, vs. Fireman's Fund Insurance Co., a Corporation, United States of America, Appellees. Apostles on Appeal. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed November 27, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12755

FIREMAN'S FUND INSURANCE COMPANY,
Appellant,
vs.

JAMES G. MULROY, as Administrator,
Appellee and Cross-Appellant.

UNITED STATES OF AMERICA,
Cross-Appellee.

STATEMENT OF POINTS

Comes now appellant, Fireman's Fund Insurance Company, and proposes on its appeal to the Circuit Court of Appeals for the Ninth Circuit to rely on the following points as error:

I.

The court erred in holding that respondent Fireman's Fund Insurance Company was liable to libelant under the terms of the war risk policy issued by it on the SS "Capillo."

II.

The court erred in not holding the United States of America liable to libelant under the terms of the Second Seaman's War Risk Policy.

BOGLE, BOGLE & GATES,
Attorneys for Appellant, Fireman's Fund Insurance Company.

Receipt of copy acknowledged.

[Endorsed]: Filed December 26, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE PRINTED AND STIPULATION AS TO EXHIBIT A-1.

To the Clerk of the United States Court of Appeals for the Ninth Circuit:

Respondent, Fireman's Fund Insurance Company, herewith designates the following as those portions of the record and proceedings which it desires should be printed in the record of the appeal of this case to the United States Court of Appeals for the Ninth Circuit.

1. Amended Libel.
2. Answer of Fireman's Fund to Amended Libel.
3. Answer of the United States of America to Amended Libel.
4. Stipulation to take testimony of Betty Jean Johnson.
5. Answer of Betty Jean Johnson to Interrogatories.
6. Findings of Fact and Conclusions of Law.
7. Decree.
8. Petition and Order of Appeal.
9. Assignments of Error.
10. Supersedeas and Appeal Bond.
11. Citation.
12. Transcript of Testimony, including Court's oral opinion.
13. Libelant's Exhibits I to VI inclusive.
14. Statement of Points.

15. Designation of Record to be Printed.

Dated this 21st day of December, 1950.

BOGLE, BOGLE & GATES,
Proctors for Appellant, Fireman's Fund Insurance
Company.

Stipulation as to Exhibit A-1
(United States of America)

It Is Hereby Stipulated and agreed by and between the proctors for the respective parties hereto that United States of America, Exhibit A-1 (being the original record of the claim of Oscar Carl Johnson for war risk insurance before the United States Maritime Commission) need not be printed or reproduced in the transcript of record, but the same may be referred to in the briefs and argument of the appeal by any of the interested parties hereto and may be submitted to this court with the same force and effect as if printed.

BOGLE, BOGLE & GATES,
Proctors for Appellant Fireman's Fund Insurance
Co.

/s/ JAMES G. MULROY,
Proctor for James G. Mulroy, Administrator of the
Estate of Oscar Carl Johnson, Deceased, Ap-
pellee and Cross-Appellant.

/s/ J. CHARLES DENNIS,
/s/ VAUGHN E. EVANS,
Proctors for United States of America Cross-Appellee.

Receipt of copy acknowledge.

[Endorsed]: Filed December 26, 1950.

